No. 14846

United States
COURT OF APPEALS
for the Ninth Circuit

LEO ELWERT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S BRIEF

Appeal from the United States District Court for the District of Oregon.

Honorable William J. Lindberg, Judge.

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JURISDICTIONAL STATEMENT

On November 20, 1953, the Grand Jury handed down, and there was filed in the office of the Clerk of the United States District Court for the District of Oregon, an indictment containing three counts, each charging Appellant with violation of Section 145(b), Title 26 U.S.C.A., in the State of

Oregon and District of Oregon (Tr. of Rec. 1). On April 29, 1955, judgment was entered in said Court adjudging Appellant guilty of the offenses charged in said indictment, imposing on him a sentence of imprisonment for a period of eighteen months and to pay a fine of $2500.00 (Tr. of Rec. 5).

The Court below had jurisdiction under **Section 3231 of Title 18 U.S.C.A.** and this Court has jurisdiction of the appeal taken from said judgment under **Section 1291, Title 28 U.S.C.A.**

STATEMENT OF THE CASE

The Indictment contains three counts charging that Appellant attempted to evade a part of the income tax owing by him to the United States for the tax years 1947, 1948 and 1949. He pleaded not guilty. A trial was had to the Court and Jury. Motions for judgment of acquittal as to each count were made and denied at the close of the Government's case and again at the close of the entire case. A verdict of guilty on all counts was returned and filed. A motion was renewed for judgment of acquittal after the verdict (Tr. of Rec. 38). The motion was denied (Tr. of Rec. 50). Judgment of guilty was entered on the verdict and sentence was imposed (Tr. of Rec. 51). Appellant appeals from that judgment.

The questions involved are:

(a) The sufficiency of the indictment raised by motions to dismiss the indictment; by

objection to the introduction of evidence at the opening of the case; by motions for judgment of acquittal made at the close of the plaintiff's case and again at the close of the entire case and by motion for arrest of judgment.

(b) Did the Court below err in denying defendant's motions for judgment of acquittal as to each of the counts of the indictment?

(c) Did the Court below err in the instructions to the Jury?

(d) Did the Court below err in refusing to give to the Jury the instructions requested by Appellant, numbered respectively, 1, 7, 10, 15, 18, 19, 20, 22, 23, 24, and 26?

(e) Did the Court below err in the admission of evidence over the objection of the defendant?

SPECIFICATION OF ERROR NO. I

The Court below erred in denying Appellant's motion to dismiss the three counts of the indictment.

ARGUMENT

The sufficiency of each count of the indictment was challenged by motions to dismiss prior to the trial (Tr. of Rec. 5 and 7) by objection to the introduction of evidence (Tr. of Rec. 16 and Tr. of Test. 2); by motions for judgment of acquittal made at the close of the Government's case (Tr. of Test. 727 and Tr. of Rec. 30), and again at the close of the entire case (Tr. of Test. 844) and by motion for arrest of judgment after the return of verdict of guilty (Tr. of Rec. 37).

Each count charges violation of **Section 145(b)** of the Internal Revenue Code which, so far as material, provides:

> "Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony. . . ."

Re Counts I and II

Count I, so far as material, alleges:

> "That on or about the 15th of March, 1948 . . . the defendant above named did willfully and knowingly attempt to defeat and evade a large part of the income tax owing by him to

> the United States of America for the calendar year **1947 by filing** and causing to be filed with the Collector of Internal Revenue . . . **a false and fraudulent income tax return** wherein he stated that his net income for said calendar year was the sum of $27,793.94 and that the amount of tax due and owing thereon was the sum of $10,670.68, whereas, as he then and there well knew, his net income for said calendar year was the sum of $39,822.86 upon which there was an income tax due in the amount of $17,981.38. . . ."

Count II is the same as Count I except that it relates to the tax year **1948.** It alleges that the net income shown on the return was $27,015.34 and the tax due thereon was $5,583.76, whereas, the net income was $48,731.82 and the income tax due was $15,919.48.

We submit that these two counts fail to state an offense because there is no allegation that the returns for the tax years 1947 and 1948 were filed with the **intent** to defraud the United States.

It is now settled beyond question that the **specific intent to defraud** the United States is an essential element of the offense defined by Section 145(b) of the Internal Revenue Code.

> Bloch v. United States, 221 F. 2d 786 (Ninth Cir.).
> Wardlaw v. United States, 203 F. 2d 884 (Fifth Cir.).

Since the specific intent to defraud is an essential element of the offense, such **intent must be alleged** in the indictment.

In **United States v. Raymond, 37 F. Supp. 957,** the Court held:

> " 'The criminal **intent** of the accused **must be alleged** where the criminality of the act depends on the intent with which it was done.'
>
> 27 Am. Jur. pp. 631, 632.
>
> 'Intent is always vital when fraud is in issue.' United States v. Shurtleff, 2 Cir., 43 F. 2d 944." (Emphasis supplied).

In **United States v. Green, 136 Fed. 618-652,** the Court held:

> "Where **intent** is of the essence of the offense attempted to be charged, it **must be set out in the indictment.** If not set out, the indictment is not good. United States v. Cruikshank, 92 U.S. 542, 23 L. Ed. 588." (Emphasis supplied).

This decision was affirmed by the Supreme Court of the United States, **199 U.S. 601, 26 S. Ct. 748,** citing many cases.

The element of specific intent to defraud cannot be incorporated into the indictment by implication or intendment.

In **United States v. Hess, 124 U.S. 483, 8 S. Ct. 571,** the Supreme Court held that,

> "The general, and with few exceptions, . . . the universal, rule, . . . is that all the material facts and circumstances embraced in the definition of the offense must be stated, or the indictment will be defective. No essential element of the crime can be omitted without destroying the whole pleading. The omission **cannot be supplied by intendment or implication,** and the charge must be made **directly,**

and not **inferentially, or by way of recital.**" (Emphasis supplied).

The bare allegation that defendant knew that his net income and tax liability were in excess of the amount stated in the return, does not supply the requirement of allegation of specific intent to defraud.

In **Morissette v. United States, 342 U.S. 246, 72 S. Ct. 240,** the Supreme Court said:

> "Knowledge, of course, is not identical with intent. . . ."

In **Elder v. United States, 142 F. 2d 199** (9th Cir.), the Court held:

> "Appellee argues that where the indictment is couched in the terms of the controlling statute and where a purely statutory crime is involved, an allegation in the language of the statute which is fully descriptive of the offense is sufficient. (Citing cases). The rule as stated by appellee, however, is subject to the qualification that if the statutory definition of a crime is so general that a pleading in its terms will not serve the purposes of an indictment, then the offense must be stated with greater particularity. United States v. Hess, 124 U.S. 483; United States v. Carll, 105 U.S. 611; Foster v. United States, 9 Cir., 253 F. 481."

Section 145(b) of the Internal Revenue Code comes within the qualification referred to by the Court. The language of the Act is so general that a pleading in the bare terms of the Act would be insufficient to constitute an indictment. Since spe-

cific criminal intent is the very essence of the offense contemplated by the statute, the indictment must charge the existence of that specific intent.

Re Count III

Count III of the indictment, so far as material, alleges:

> "That during the calendar year **1949** Leo Elwert, the defendant above named, . . . had and received a net income of about $9,007.81; that upon said net income he owed to the United States of America income tax of $1,669.00. . . .; that well knowing the foregoing fact, the said Leo Elwert, the defendant above named, on or about the 15th of March 1950 . . . did willfully and knowingly attempt to evade and defeat the said income tax by . . . **failing to make such income tax return** to the Collector of Internal Revenue . . . and by failing to pay to said Collector . . . said income tax **and by concealing and attempting to conceal** from all proper officers of the United States of America his true and correct gross and net income for said calendar year 1949. . . ."

What has been said with respect to the absence of any allegation of **intent to defraud** in Counts I and II of the indictment, applies equally to Count III because there is no allegation in that count that the failure to file the return was with the intent to defraud the Government.

Failure to file a return does not constitute an attempt to evade the tax, and is not a violation of **Section 145(b)** (a felony) **of the Internal Revenue Act. (Spies v. U. S., 317 U.S. 492, 63 S. Ct. 364.)**

Failure to file a return may be a violation of **Section 145(a) of the Internal Revenue Code,** (a misdemeanor) subject to a different penalty and to a different statute of limitations.

In the case at bar, a prosecution for violation of **Section 145(a)** for failure to file a return was barred by the three-year Statute of Limitations when the indictment was returned. The limitation for prosecution for violation of Section 145(b) is six years. The return for the tax year 1949 had to be filed on or before March 15, 1950. The indictment was returned on November 20, 1953, more than three years after the alleged commission of the offense under Section 145(a). **(Section 3748 (a) Internal Revenue Code, now Section 6531 of the Internal Revenue Code of 1954).**

In the **Spies v. United States case,** the Court held that mere willful failure to file a return and willful failure to pay tax (a misdemeanor) does not constitute an attempt to evade income tax (a felony) without allegation of **affirmative acts** showing that the failure was actuated by an evil motive to evade the tax. The Court said:

> "We think that in employing the terminology of attempt to embrace the gravest of offenses against the revenues Congress intended some willful **commission** in **addition** to the **willful omissions** that make up the list of misdemeanors. Willful but passive neglect of the statutory duty may constitute the lesser offense, but to combine with it a willful and

> positive attempt to evade tax in any manner or to defeat it by any means lifts the offense to the degree of felony."

In **Jones v. United States, 164 F. 2d 398** (Fifth Cir.), the Court held:

> "In the Spies case, the Supreme Court, pointing out with admirable clarity and correctness the nature of the accusation pressed in this case and of the evidence required to establish guilt of it, has left in no doubt the right of a defendant so charged to have his defenses clearly and fairly put. Definitely settling that the **mere failure to return income and pay the tax on it, though the taxpayer knew that it was due, would not constitute the offense of wilfully attempting to defeat and evade the income tax** and stating that something more than this must be shown, . . ." (Emphasis supplied).

Appellee contended, and the Court below held, that Count III was sufficient under Section 145(b) because of the inclusion of the phrase:

> "and by concealing and attempting to conceal . . . his true gross and net income for said calendar year 1949 . . ."

We submit that the inclusion of this phrase was insufficient to convert the offense from a misdemeanor under 145(a) to a felony under 145(b) and make applicable a longer statute of limitations.

First: There is no allegation to show the manner or the means by which concealment was accomplished other than the bare fact that the return was not filed. The allegation that defendant con-

cealed or attempted to conceal without any facts, constitutes a **conclusion** merely.

In **United States v. Fuselier, 46 F. 2d 568,** the Court held:

> "The first count alleges that the several defendants, some of whom were the bankrupts, and other outside persons **did conceal** from the trustee certain property belonging to the bankrupt estate. . . ."
>
> . . . . .
>
> "This count merely charges the **legal conclusion** that the defendants did conceal the property described plus the **further legal conclusion** that it was the land embraced in the pretended act of sale . . . to the fictitious corporation. There is **no allegation of fact as to what was done to conceal** the property or as to why or how the transaction was pretended or the corporation fictitious. My view is that this does not state any fact upon which the Government could introduce proof to show the circumstances necessary to constitute an offense for the simple reason that they have not been alleged. In other words the count contains nothing but **legal conclusions** and for that reason **is insufficient** in law to compel the defendants to meet them as a criminal charge." (Emphasis supplied).

Second: It does not allege the commission of any "affirmative act" or "positive act" of the character referred to by the Supreme Court in the **Spies case,** which the Court held was essential to a charge of tax evasion as distinguished from failure to file a return.

Third: At best, the word "conceal", standing alone without allegation as to the manner in which

concealment was accomplished, is **an equivocal term** because concealment may be accomplished by "affirmative" acts and may be accomplished by "inactivity" or silence, and as has already been pointed out in the **Spies case** and in the **Jones case,** "mere passive inaction" does not constitute evasion under Section 145(b). "Willful but passive neglect of the statutory duty", does not constitute tax evasion.

As was said in the **Spies case**:

> "The difference between the two offenses, it seems to us, is found in the **affirmative action** implied from the term 'attempt', as used in the felony subsection."

In **Bratton v. United States, 73 F. 2d 795** (Tenth Cir.), the Court held that in order to charge "concealment", indictment

> "must allege something more than mere failure to disclose—some **affirmative act** of concealment, such as suppression of the evidence, harboring of the criminal, intimidation of witnesses, or other **positive act** designed to conceal from the authorities the fact that a crime had been committed." (Emphasis supplied).

The word "conceal" or "attempt to conceal", used in the indictment, is not an allegation of the affirmative action within the purview of the Supreme Court's decision in the **Spies case.**

The Supreme Court rejected the idea that "attempt" may be found on the basis of "inactivity" or on "refraining to act."

We submit that the inclusion of the phrase, "conceal or attempt to conceal," in Count III of the indictment, was merely an adroit maneuver by the Appellee to avoid the plain rules of law laid down by the Supreme Court in the Spies case, **to accomplish an enlargement of the statute of limitations and the conversion of a misdemeanor into a felony.**

SPECIFICATION OF ERROR NO. II

The Court below erred in denying defendant's motions for judgments of acquittal as to each of the counts of the indictment.

ARGUMENT

Summary of the Argument

A

The evidence was insufficient to warrant submission of the case to the jury because it does not support a finding of guilt beyond a reasonable doubt as to any of the counts of the idictment.

B

All evidence of supicious circumstances was dissipated by exculpatory evidence which is part and parcel of the Government's case.

C

There is no evidence to sustain a finding of fact beyond a reasonable doubt that defendant had **knowledge** that the returns for the years 1947 and 1948 (Counts I and II) were false when filed.

D

There is no evidence to sustain a finding of fact beyond a reasonable doubt that defendant filed or caused to be filed the returns for 1947 and 1948 (Counts I and II) **wilfully and** with the **specific intent** to defraud the Government.

E

There is no evidence to sustain a finding of fact beyond a reasonable doubt that the defendant **actually owed** the Government any **tax in excess** of amount shown on his returns for the tax years 1947 and 1948 (Counts I and II). The evidence establishes affirmatively as part of the Government's case that defendant failed to take allowable deductions in each of said tax years in amounts which more than offset the alleged increase in tax liability asserted by the Government.

F

The evidence introduced by the Government as part of its case, establishes affirmatively that many of the alleged inaccuricies in the returns, both of income and allowable deductions, were due to carelessness, negligence, incompetance and indifference of defendant's accountants and to carelessness and negligence and ignorance on the part of defendant, and not the result of intent to evade the tax.

G

There is no evidence sufficient to sustain a finding of fact beyond a reasonable doubt that the fail-

ure of defendant to file a return for the tax year 1949 (Count III) was with the specific intent to evade payment of this tax liability.

H

The Government's evidence establishes affirmatively that the failure to file a return for the tax year 1949 (Count II) was due to carelessness, neglegence and indifference of defendant's accountant who was entrusted with the duty of preparing returns for defendant and causing them to be filed.

I

The Government's evidence establishes affirmatively that defendant's accountant prepared the return for the tax year 1949, but did not deliver the same to defendant for signature and filing; that the accountant retained the same in his possession and it was found in the possession of the accountant by the Internal Revenue Agents. He did not testify how it came into his possession.

J

There is no evidence that the defendant was aware that the return for the year 1949 had not been filed.

K

The **return** prepared by the accountant **for** the tax year **1949,** but not signed or filed **shows** that there was **no tax liability** for that tax year which negatives any inference that the failure to file said return was with intent to evade the tax.

L

The evidence was insufficient to sustain a finding of fact beyond a reasonable doubt that the defendant had any taxable net income and owed any tax for the tax year 1949. On the contrary, the Government's evidence establishes affirmatively affirmatively that he did not have any taxable net income in said tax year. (Count III).

M

The evidence fails to support a finding beyond a reasonable doubt that defendant committed any "affirmative" act constituting attempted evasion or concealment with respect to his income tax liability for the tax year 1949 within the purview of the **Act (Spies case).**

N

The failure to file a return, even if wilfull, does not constitute an attempt to evade the tax and violation of **Section 145(b) of the Internal Revenue Act (Spies case).**

O

The unsigned and unfiled tax return prepared by the accountant, for the tax year 1949, was an insufficient and improper basis to be used as a starting point for the computation of taxable net income and tax liability for said tax year, especially in view of the gross inaccuracies (overpayment of gross income by $19,000.00 to $20,000.00) in said prepared return admitted by the Government's witnesses.

Preliminary Statement of Facts Applicable to All Three Counts

The facts hereafter narrated were established by the testimony of the Government's witnesses as a part of the Government's case and were in part corroborated by evidence introduced in the defendant's case.

Defendant is a farmer, approximately 50 years of age. He was born and has lived all his lifetime in the vicinity of Sherwood, Oregon, a small town in the Tualatin Valley. His schooling consisted of attendance at grade school for five or six years (Tr. of Test. 783). He engaged in farming and raising nursery stock all his lifetime (Tr. of Test. 775).

During the years in question and for about twenty years prior thereto, defendant and his wife, Mary, engaged in the farming and nursery business as co-partners under the trade name of "Tualatin Valley Nursery Co." Over the years, they accumulated and operated a number of farms on which were raised nuts, cherries, prunes, nursery stock, and other farm products. These farms were not contiguous. They were scattered over a considerable radius from the home place. In the conduct of the operations, defendant devoted his time and attention to the farming operations consisting of the planting and cultivating, pruning, harvesting nursery stock and other farm products, which kept him out in the fields all of the time, while his wife, Mary, attended, to a large extent, to the business

phases of the operation. She looked after the banking. The bookkeeping, such as was maintained, was done by her and under her supervision at the home place in an office maintained at the nursery. They did mostly what is known as a mail-order business. A small part of ther business was transacted at the place of business.

During the years in question and for some years prior thereto, they maintained three bank accounts; one account at the Sherwood Bank in which they deposited money orders received in the mail. Two accounts were maintained at the Tigard Branch of the United States National Bank of Portland, one under the name of "Tualatin Valley Nursery Co." and one, "Real Estate Account." Checks received in payment of farm products which they sold, were deposited in the Tualatin Valley Nursery Co. account. Up to the fall of 1946, defendant and his wife both drew checks on those accounts.

In the fall of 1946, defendant became involved in serious domestic difficulties by reason of an affair with a married woman. The husband of this woman, one named Bloomquist, through attorneys, made demands for about $30,000.00 damages for the alienation of his wife's affections (Tr. of Test. 211). By reason of these threats, defendant's wife, Mary Elwert, drew out substantially all of the monies on deposit in the Tualatin Valley Nursery account and transferred the same to an account in her own name and the business of the Nursery was

thereafter transacted through that account. The defendant could not draw checks on that account. A small account was opened, called "Labor Account" in which small sums of money were deposited to meet checks drawn to laborers. Defendant could draw checks on that account for that purpose only. As the trouble brewed and progressed, defendant's wife directed the Sherwood Bank not to honor any checks drawn by defendant.

In the fall of 1946, Bloomquist commenced an action in the Circuit Court of the State of Oregon for damages for alienation of his wife's affections. Defendant was represented in that action by Attorneys named Asbahr, Hanley and Bernstein.

In the fall of 1948 defendant went to Idaho, established a residence and brought suit for divorce against his wife. A decree of divorce was entered in June or July of 1949. During that period of time, Mary Elwert handled all the financing.

The relations between the husband and wife became very antagonistic and defendant left the home and lived elsewhere, but continued to give attention to the farming operations. He had little or nothing to do with the business operations carried on at the office or the home place and was seldom there. He exercised no supervision or control over the bookkeeping at the office.

As a result of the dissension, litigation, the appropriation of the bank accounts by defendant's wife, defendant found it difficult to carry on any

business or to maintain any bank accounts. He feared seizure and appropriation by his wife of his funds.

In the operation of the farms, he constantly needed large sums of money in cash for the payment of itinerant labor that had to be paid daily **in cash.** He expended over $20,000.00 in each year in such cash payments. He also had been in the habit, during all of the years, of making many purchases for the business and paying therefor **in cash.** He rarely took any receipts for such cash payments. These ran into many thousands of dollars in each year.

Defendant kept no records of these cash payments for itinerant labor and other cash expenditures for the business with the result that they were not reflected in the books of account and were not reflected in the tax returns that were made from the books.

The accountants Cook, who made out the 1947 return, and Hammond, who made the 1948 return and prepared the 1949 return, both testified to defendant's carelessness in keeping records of business expenditures made in cash. They tried to pursuade him to keep records, but were unable to do so with the result that the accountants gave no effect to these expenditures which would have been allowable deductions, and as will be later demonstrated, were greater in amount than the alleged tax deficiency.

The difficulties referred to above and the necessity of obtaining cash with which to meet these expenditures, caused defendant to resort to the practice of cashing some of the checks and disbursing the proceeds for such cash disbursements instead of following the normal course of depositing the checks in the business bank account.

In the Bill of Particular relating to each count, there is enumerated the specific items of alleged unreported (partnership) income. Some of the checks referred to therein were cashed and disbursed by defendant for business purposes as aforesaid, but a number of the large checks were deposited by the defendant in the bank account of the partners maintained at the Tigard Branch of The United States National Bank titled "real estate account" and if those items were not included in the income tax returns, it was due to the failure of the accountant to give effect to that bank account in preparing the income tax returns. The accountant Hammond, a witness for the Government, testified that he did not take into account the deposits in the "real estate account" in making the returns although he knew of the existence of that account.

The returns for the tax year **1947** was prepared by the accountant Cook, who was a former Internal Revenue Agent. The record shows that he was exceedingly careless, indifferent and incompetent in the preparation of that return. He made

no effort to ascertain the amount of cash expenditures made by the defendant for business purposes and to take the same as allowable deductions. He failed to take allowable deductions to the extent of over $6,000.00 for income taxes paid to the State of Oregon by the partners, which was an allowable deduction for the tax year 1947 and he failed to take allowable deductions which will be demonstrated hereafter.

The return for the tax year **1948** was prepared by the accountant Hammond, the Government's witness, who was a former Deputy Collector of Internal Revenue, and who solicited the business of the Nursery. His evidence, likewise, establishes that he was grossly careless, incompetent and indifferent. In computing the receipts of the partnership, he only took into account the items appearing as deposits in the bank account of the Tualatin Valley Nursery at the Tigard Branch of The United States National Bank. He did not take into account the deposits made in the "real estate account."

In computing the deductions, he only gave effect to deductions represented by checks issued therefor. He knew that large sums of money were expended in cash for business purposes. He made no effort to ascertain the facts in respect thereto or give effect to such expenditures as allowable deductions. He failed to take numerous allowable deductions of large amounts to which defendant was entitled as a matter of law; for depreciation;

for capital losses; loss carry-backs, and the like, in many thousands of dollars, which will be later demonstrated.

If the allowable deductions had been taken, the return would have shown a loss instead of an additional tax liability of $5,229.76 as testified to by the Government expert Mytinger.

A return for the tax year **1949** was prepared by Hammond for the partnership and for the individuals. These returns were never signed or filed. He testified that he brought the returns to the home of Mary Elwert a few days before the due date; that he left the returns with both Mary and Leo Elwert with instructions to sign them. His own testimony demonstrated the falsity of that testimony. The facts are established by the Government's testimony that the original documents purporting to be the partnership and individual returns, were found in the possession of Hammond by the Internal Revenue Agent Menlow. The Revenue Agent obtained those returns from Hammond and he had photostatic copies made of the returns. The returns were later returned by the Revenue Agent to Hammond and Hammond turned them over to defendant's accountant. It is obvious that he could not have left the returns with the defendant and his wife as he at first claimed he did.

Hammond was grossly incompetent, careless, or indifferent in the preparation of the 1949 returns. The Revenue Agent Menlow and Hammond, as wit-

nesses for the Government, both conceded that the partnership return showed partnership income of $19,000.00 to $20,000.00 in excess of the gross income reflected by the books and records. They were unable to reconcile the difference.

In that year, too, Hammond failed to take allowable deductions running into many thousands of dollars which, if taken, would have established a loss of many thousands of dollars instead of a tax liability of **$657.08** as testified to by the Government's expert Mytinger.

A

Re: Knowledge of Falsity of the 1947 and 1948 Returns

Assuming, without admitting, that the returns for the tax years 1947 and 1948 were false, there is no evidence in the record to support a finding, beyond a reasonable doubt, that defendant knew or was aware of the falsity.

The 1947 return was prepared by the accountant Cook (Government's witness). The 1948 return was prepared by the accountant Hammond (Government's witness).

Both accountants prepared partnership information returns and based thereon, they prepared defendant's individual returns.

The 1947 (Ex. 2, Tr. of Test. 22) partnership return, which is the basis of defendants individual

return, was **not signed by defendant.** It was signed by his wife, Mary Elwert, only. It was **erroneously admitted** in evidence over defendant's objection (Tr. of Test. 12, 13, 14, 20, 21, 22).

Both accountants merely testified that they prepared the returns, but gave no testimony as to how or under what circumstances, or when, they were signed. They did not even testify that they saw them sign the returns. They gave no testimony of any conversation with defendant or Mary Elwert relating to the returns regarding their contents or the basis upon which they were prepared, or how the information contained therein was obtained, or what was included or what was excluded. In short, there was no conversation at all of any kind which would throw any light upon the question as to the extent of defendant's knowledge as to the accuracy of the returns. There is no evidence that defendant examined the returns or any records at the time to ascertain the accuracy of the returns, or that any information of any kind was communicated to him as to the information contained therein.

Cook testified that he did not file the 1947 return; that "they picked them up." "I don't remember whether I gave it to Mary or whether I gave it to Leo." (Tr. of Test. 22). This is the sum total of Cook's evidence as to the circumsances surrounding the execution and filing of the returns for 1947.

Hammond merely testified that he prepared the 1948 return (Tr. of Test. 218).

There is no evidence that defendant filed or caused to be filed the 1947 and 1948 partnership and individual returns.

The evidence establishes beyond question that Leo Elwert had nothing to do with the keeping of any accounting records. There is not a scintilla of evidence that he knew what records the accountants used in making up the returns. There is no evidence that he was aware that the accountants had failed to take into account the bank accounts in the Tigard Branch of The United States National Bank (real estate account) in making up the returns, and there is no evidence that he was aware that they failed to take into account the many receipts which were in the files showing cash disbursements in taking allowable deductions.

There is not a scintilla of evidence that defendant knew, or from which an inference of knowledge can be drawn, of any falsity or inaccuracy in any of the returns. He was wholly ignorant of any inaccuracies therein.

Knowledge of the falsity of the returns is the very heart of the charge of attempted evasion, especially under the indictment in the case at bar which charged that the attempted evasion was accomplished by filing and causing to be filed a false and fraudulent income tax return and that he

"well knew" that his tax liability was greater than the amount reported in the return.

In **Direct Sales Co. v. United States, 319 U.S. 703, 63 S. Ct. 1265,** the Supreme Court held:

> **"Without the knowledge, the intent cannot exist.** U. S. v. Falcone, 311 U.S. 205. Furthermore, to establish the intent, the **evidence of knowledge must be clear and unequivocal."** (Emphasis supplied).

In a criminal case, there can be no such thing as **constructive** knowledge.

> **Morissette v. United States, 342 U.S. 246, 72 S. Ct. 240.**
> **Bloch v. United States, 221 F. 2d 786** (9th Cir.).

Where **specific intent** is the crux of the case, knowledge of the facts from which intent is to be determined, must be **actual** knowledge and **not constructive** knowledge, and that knowledge, as the Supreme Court said, must be established by clear and unequivocal evidence.

In **Hargrove v. United States, 67 F. 2d 820** (5th Cir.), a prosecution for tax evasion, the Court reversed the conviction, holding:

> "In the second class of cases, a specific wrongful intent, that is, **actual knowledge** of the existence of obligation and a wrongful intent to evade it, is of the essence." (Citing numerous cases) (Emphasis supplied).

In the absence of **actual knowledge of understatement,** there can be no specific intent to evade.

In **Morissette v. United States, 342 U.S. 246, 72 S. Ct. 240,** the Court held:

"Knowledge, of course, is not identical with intent . . . ."

In **United States v. Litberg, 175 F. 2d 20** (7th Cir.), the Court held:

"In other words, **an inference may not properly be relied upon** in support of an essential allegation **if an opposite inference** may be **drawn with equal consistency** from the circumstances in proof. In United States v. Tatcher, 3 Cir., 131 F. 2d 1002, 1003, the court reversing a conviction based on inferences stated: 'To justify conviction of crime where the evidence relied upon is circumstantial in nature, the evidence must be such as to exclude every reasonable hypothesis but that of guilt. United States v. Russo, 3 Cir., 1941, 123 F. 2d 420. As we have seen, **the evidence** relied upon to sustain the defendant's conviction **is as consistent with his innocence as with his guilt.'**

In United States v. Russo, 3 Cir., 123 F. 2d 420, 423, **where knowledge was an essential element** of the offense charged, it was held a **judgment could not be sustained where the inference of lack of knowledge was as readily deducible as that of knowledge.** See also Isbell v. United States, 8 Cir., 227 F. 788, 792; Pierce v. United States, 6 Cir., 115 F. 2d 399, 400; Hammond v. United States, 75 U.S. App. D.C. 395, 127 F. 2d 752, 753;

The scienter of the offenses charged is that the notes were passed or possessed 'with intent to defraud and with knowledge that they were counterfeited,' and **in the absence of proof of such intent and knowledge a judgment of conviction cannot stand."** (Emphasis supplied).

With respect to the tax year **1949 (Count III)**, the attempted evasion is predicated on the **failure to file a return** and not on the charge of knowingly filing a false return as in Counts I and II.

Assuming, without admitting, that the failure to file a return would be a violation of Section 145(a) (misdemeanor) or 145(b) (felony), it would have to be established beyond a reasonable doubt that the failure to file a return was intentional and to be intentional, the **defendant must know and be aware of the failure to file a return** and that he failed to do so to accomplish the evil purpose of evading his tax.

The failure to file a return could be due to forgetfulness, through inadvertence, and other causes which would not be attributable to an intent to evade tax.

In the case at bar, there is no direct testimony as to why the 1949 return was not filed. Hammond testified that he prepared the partnership and individual returns and delivered them to Mary and Leo Elwert at their home. So far as his testimony is concerned, the record is silent as to what happened thereafter. There is no evidence of any conversations with defendant in which he gave any explanation as to the reason for the failure to file the return.

The Government's testimony establishes affirmatively that Hammond did not deliver the prepared returns to defendant. The Government's

evidence establishes that the original prepared returns were found in the possession of Hammond, the accountant, by Menlow, the Internal Revenue Agent; that he took possession of those returns along with all of the other records. Menlow caused photostat copies of these returns to be made and the originals, along with all the other records, were returned by him to Hammond who later surrendered them to defendant's accountant. This is the Government's testimony. Revenue Agent Menlow testified (Tr. of Test. 577) that he obtained these returns from Hammond; that he had photostat copies made under his direction and that the original returns were among the records that were turned over to him by Hammond. It is perfectly obvious that Hammond had not delivered the returns to defendant as he originally testified.

Hammond ultimately admitted that he turned over these returns to the Government. He testified (Tr. of Test. 228):

> "Q. MR. MEAD: These returns were furnished by you to the Government for the purpose of taking these photostatic copies; is that correct?
>
> A. Yes."

The least that can be said, is that Hammond prepared the returns at some time either before or after the due date, but neglected to deliver them to defendant for signature and filing. He obviously was mistaken in his belief that he had delivered the returns to the defendant, or deliberately tried

to shield himself from criticism by throwing the blame on defendant and his wife.

From all this, it is clear that the failure to file the 1949 return was the result of either carelessness, mistake or inadvertence on the part of the accountant and perhaps of the defendant. It certainly is not due to a motive to evade payment of income tax.

The tax returns which Hammond prepared disclosed that there was **no tax liability** and it is inconceivable that defendant would deliberately refuse or fail to sign and file the same for the purpose of tax evasion.

The evidence was insufficient to sustain a finding of fact beyond a reasonable doubt that defendant had **knowledge of the falsity of the returns** for the years 1947 and 1948, or that he had **knowledge** and was aware **that the return for the year 1949** had not been filed.

The motions for judgment of acquittal should have been granted on that ground.

B

There Was No Falsity in Fact in the 1947 and 1948 Returns Counts I and II

In a prosecution for attempted tax evasion, the existence of an actual tax liability, in fact, is the very heart of the case. There can be no tax evasion in the absence of an actual tax liability.

In the case at bar, the Government's case establishes that there was no tax liability, in fact, in excess of the amount reported in the returns.

The alleged excess tax liability, testified to by the Government's experts Menlow and Mytinger, was arrived at by computations which excluded many items of allowable deductions and items of loss, carry-back and carry-forward deductions. For the year 1949 the Government included an admitted overstatement of partnership income of $19,000.00 to $20,000.00.

The taking of these allowable deductions establishes a loss in each of the tax years instead of a tax liability.

There is conclusive evidence, which is part and parcel of the Government's case and supplemented by defendant's evidence, that large number of itinerant workers were employed during the tax years in question; that they were employed on a day to day basis; that they were **paid in cash** (not by check) **each day;** that no receipts were ever taken; that no record was ever made of these cash expenditures; that the cash with which to make these cash payments was obtained by defendant by cashing checks payable to the Nursery, either in payment of merchandise sold or in payment of the sale of real property, and that the remittances described in the Bill of Particulars purporting to be unreported income (except those which were deposited in the Firm's bank account) were con-

verted into cash and used to make the cash disbursements. These cash expenditures were not reflected in the tax returns.

C

Testimony Relating to Expenditure of Cash for Itinerant Labor

Government's witness Cook was aware that itinerant labor was used (Tr. of Test. 62); and that defendant did pay some Mexican labor and people of that nature directly (Tr. of Test. 63). He testified:

> "And I know I asked him several different times, or told him that he should have a slip for them to sign. He said, 'Well, they can't even sign their name.' I said, 'Well, they can at least make an X for that, which will give me a basis on which to put that down as an expense. But that was another thing that I couldn't get him to do. He was too busy." (Tr. of Test. 63).

Cook explained to defendant the importance of keeping the cash record and how it would affect him and that he "would need it if deductions were to be taken, and otherwise they would be lost." He testified:

> "Q. And he explained to you that as to these cash payments to laborers some of them could not read or write?
> A. That is right.
> Q. And it would be a great deal of difficulty to get them?
> A. That is right." (Tr. of Test. 64).

Government's witness Schmidt testified that he cashed checks for defendant; that he usually brought a lot of small checks after banking hours for cashing and then the next day he gave defendant the money (Tr. of Test. 159). He received the check from defendant for $12,750.00 (one of the items of alleged unreported income) and issued a number of checks for smaller amounts at different dates (Tr. of Test. 163), which were cashed. He did that as an accommodation to defendant (Tr. of Test. 164). He testified:

"Q. What was his reason?

A. He wanted the check divided into smaller amounts so he could take care of some Winos and help he had." (Tr. of Test. 164).

Schmidt cashed the checks and gave defendant the cash (Tr. of Test. 165). He testified:

"Q. Now I think you stated, Mr. Schmidt, that from time to time you were in the habit of cashing checks for Leo Elwert on your direct examination; is that right?

A. That is right.

Q. And I think you further made the statement that you cashed the checks because he was in need of getting funds to take care of Winos and labor. Will you explain what you mean by Winos, Mr. Schmidt.

A. Well, I suppose it was a bunch he picked up down in skid row. He sent in a truck or two trucks a day for help, and the way I understand he had to pay them in cash, so he required money every day to take care of that itinerant help.

Q. Was this particularly during the harvest season and the planting season of the year?

A. Yes." (Tr. of Test. 188-189).

Defendant's witness Helvie testified that she did office work for the Nursery (Tr. of Test. 731). Many itinerant workers were employed during the years 1946 to 1949 to do harvesting work during the reasons of harvesting and of cultivating and planting (Tr. of Test. 731) and especially during the nut and prune harvest times in the fall of the year.

> "They brought them in on a truck and the truck would be full."

They were paid by cash,

> "because they seldom ever had the same men two days in a row."

No records were kept of the cash payments to the itinerant help and no payroll records were kept (Tr. of Test. 732). The men were paid by Leo and by Mary both. They would be loaded on trucks and taken back to town. She did not know where the money came from that the men were paid with (Tr. of Test. 733).

Defendant's witness Hull testified that he worked for the Nursery; drove a truck and did field work. He was one of the regular employees of the Nursery (Tr. of Test. 741). During 1947, 1948 and 1949, during the harvesting and planting seasons, he picked up itinerant workers for the Nursery down at Sixth and Burnside Streets in Portland (Tr. of Test. 742). He would pick up as many as the truck would hold. In the harvest season, their services were required for a month or

two and maybe longer. He hauled the men to the various farms (Tr. of Test. 742). The men were paid mostly in cash. No receipts or records were made with regard to those payments. Payments were made by defendant and by the witness and by one Francis Mendel, the field boss (Tr. of Test. 743).

Defendant's witness Cornett testified that he was in the employ of the Nursery from 1945 through the middle of 1947. He drove the truck and tractor. During the cherry crop time, he would go to Portland and pick up help by the truck load. He would take them out to the cherry fields, pay them off in the evening, and haul them back to Portland. He also brought more to other fields operated by the Nursery (Tr. of Test. 748). During the cherry picking time, he had seventeen to eighteen men a day. He paid them in cash. He got the cash from defendant (Tr. of Test. 749). He did not take any receipts from the men. The same practice was followed with respect to the filbert crop and the walnut crop (Tr. of Test. 750-751). The pickers were paid by the box for the cherries (Tr. of Test. 754).

Defendant's witness Farmer testified that he worked for the Nursery. He did field work from 1945 to 1952. He was a regular employee. He observed the employment of itinerant labors during 1947, 1948 and 1949 during the spring and fall seasons of the year (Tr. of Test. 770). He observed

that the laborers were paid in cash; that no records or receipts were made. These cash payments were made by Francis Mendel, the foreman, and by defendant (Tr. of Test. 772).

Defendant's witness Meyer testified that he worked for the Nursery. He was familiar with the practice of hiring itinerant help. On a few different occasions, he took his truck to an employment office in Portland about half past six o'clock in the morning. **He loaded twenty-five to twenty-six men on the truck** (Tr. of Test. 776). He saw a lot of different gangs on different places at different times. In the nursery business, **this was common practice** (Tr. of Test. 777). The men were paid mostly in cash by Francis Mendel.

Defendant's witness Mendel testified that he was employed by the Nursery for about twenty years. He was a field foreman (Tr. of Test. 787). He described the number of farms and nurseries that were operated during 1947, 1948 and 1949; that itinerant labor was employed in connection with these operations (Tr. of Test. 793). The harvesting was done principally by the itinerant labor (Tr. of Test. 795). They were paid "so much a lug." They **usually brought in two truck loads of men** and defendant would bring out as many more as he could get in his pickup truck (Tr. of Test. 796). They usually hauled about **twenty-five men to a truck** and **they would bring in between sixty and seventy people at a time during the harvest**

(Tr. of Test. 796). The itinerant labor was paid in cash "when you took them back at night" (Tr. of Test. 796). If you did not pay them in cash, they would not come back. "They come out and work one day, and the next day you get a new load altogether." (Tr. of Test. 796). "Those people will just work a day or two at best." **This was common practice followed by the farmers in that part of the country** (Tr. of Test. 797).

For the nut harvesting, the men were paid on a poundage basis. The cherry pickers were paid about the same way. Each night they weighed in the amount that each one picked and he was paid. The harvest of the **cherry crops usually took from twenty to thirty days** (Tr. of Test. 798). He paid the cherry pickers himself. He also paid the itinerant workers for the nursery work (Tr. of Test. 799). In the spring, the operations were about the same way (Tr. of Test. 799). In the **work of pulling nursery trees,** they usually **employed about twenty-five to thirty itinerant** workers during the years 1947, 1948 and 1949. He paid them off each night (Tr. of Test. 800). The payments were nearly always in cash. For a while he took slips of paper on which the men signed by making their mark. When he brought them to the office, the bookkeeper would ask, "what am I going to do with these?" Sometime he left them at the office and sometime he threw them away (Tr. of Test. 801). No payroll books were kept of these itinerant laborers and no record was kept of the cash payments. The

itinerant laborers demanded cash. It was easier to pay them in cash than to fool around with checks. The men demanded cash because they had trouble cashing checks (Tr. of Test. 802). **He got the cash with which to pay the men from the defendant** most of the time. He never signed any receipts for the money. He just picked up the money from the defendant and would go out and pay off the field crews (Tr. of Test. 803). **Each crop would last around twenty to thirty days** and **followed each other.**

Nellie Elwert, defendant's sister-in-law, testified as a witness for defendant. She and her husband, defendant's brother, are engaged in farming in the same vicinity as defendant and she had charge of recruiting itinerant labor for their farm (Tr. of Test. 809, 810). She was familiar with the employment of itinerant labor at the Tualatin Valley Nurseries. She was employed by the Nursery to get laborers during the nut and fruit harvest and nursery operations (Tr. of Test. 810). She went to the employment agency in Portland and supervised the loading of trucks with itinerant workers. She fixed lunches for them. She would be down at the employment office about 4:30 or 5:00 o'clock in the morning. She would bring them back about 4:00 o'clock in the afternoon. **The practice was to pay these workers in cash.** They could not get help unless they did pay in cash. The men would have trouble cashing the checks. (Tr. of Test. 812). She paid them each night. She got dif-

ferent people all the time. Some times she got the same person under several different names (Tr. of Test. 814). The average pay of laborers was about six to seven dollars a day or about 75¢ an hour (Tr. of Test. 815).

There can be no question under this record, coming from the Government's, as well as defendant's, witnesses, that large numbers of itinerant workers were employed during the tax years in question, as many as sixty to seventy a day; that they were employed over long periods of time during the spring and fall months of the year; that they were paid in cash; that no records were kept and that these expenditures, which ran into thousands of dollars, constitute legal allowable deductions. There is no evidence to the contrary.

It is, of course, impossible to make an accurate computation of the amount of money so expended in each of the tax years.

But a fairly accurate estimate of the amount can be made sufficient for the purpose of determining whether the amounts so expended would affect the realization of the net income during the years in question.

The record establishes at least the following **minimum cash expenditure for itinerant workers:**

Nursery Workers (Spring work and harvesting):

65 days X 25 men @ $5.00 per day... $ 8,125.00

Nut Harvest:
30 days X 50 men @ $5.00 per day.... 7,500.00

Cherry Harvest:
20 days X 20 men @ $5.00 per day.... 2,000.00

Prune Harvest:
30 days X 25 men @ $5.00 per day.... 3,750.00

Total annual **minimum expenditure** in cash for itinerant labor..... $21,375.00

This sum was a proper lawful allowable deduction in each of the three tax years, which was not taken into account by the accountant who prepared the returns, and was not given any effect in the computations of alleged tax liability made by the Government's expert witnesses Menlow and Mytinger.

The record establishes beyond question that the only labor that was taken as a deduction in the tax years, were the amounts paid to regular employees by check and these amounts were taken by the accountant from the record kept for the State Industrial Accident Commission. In that record, only the monies that were paid by check to regular employees was entered and these are the only deductions taken in the income tax return.

Allowance of a deduction in each of the tax years in question for this itinerant labor more than wipes out all of the alleged unreported net income and also wipes out the income reported on the income tax returns.

D

Re 1947

Count I of the indictment charges that the tax liability for 1947 was under-stated in the amount of $7,310.70

The under-statement of tax liability for 1947, as computed by the Government's expert Mytinger, without giving effect to the aforesaid expenditures for itinerant labor and other allowable deductions hereinafter referred to, was the sum of **$5,229.76,** the difference between the tax liability of $15,900.-44 computed by him and the tax liability shown on the return of $10,670.68. This increase in tax liability was based upon an alleged increase of $8,709.62 in net income as computed by the Government's expert (Tr. of Test. 703) being the difference between $36,503.56 net income computed by the expert and $27,793.94 reported by the taxpayer in his return.

Summary of Allowable Deductions Not Taken in 1947 Partnership and Individual Returns

(a) **$ 3,093.75:** In 1947, defendant paid this sum to the Oregon State Tax Commission on his **individual** 1946 tax liability (Tr. of Test. 45, 604, 612-614, 703, and Def. Exh. 111, checks totaling twice that amount being the tax payment for both partners). There was no deduction taken for this item (Exh. 2), (Tr. of Test. 601).

(b) **$20,000.00:** Payments **in excess of that amount** to itinerant laborers **in cash** for which no record was maintained as heretofore demonstrated.

(c) **$ 3,429.25:** Payment in cash to Progressive Printing Co. for printing catalogs (Tr. of Test. 760, 761, Exh. 106). The Revenue Agents found the receipted bills showing payment in cash in the records (Tr. of Test. 583).

(d) **$ 500.00:** Paid to Progressive Printing Co. for purchase of print paper (Tr. of Test. 756-757).

(e) **$ 270.00:** Loss of $540.00 was sustained on the sale of 99 W Motel (depreciable business property), allowable in full if not offset by capital gains under **Section 117(j) of the 1939 Internal Revenue Code** and amendments thereto. The accountant erroneously took a deduction of $270.00 only (Tr. of Test. 42) (Exh. 2).

(f) **$ 275.00:** Loss on the sale of an army truck was $550.00. Only $275.00 was taken as a deduction in the return (Exh. 42) (Tr. of Test. 42). The full amount of the loss was deductible because the army truck was depreciable business property used in the business. **Section 117(j) of the Internal Revenue Code and Amendments thereto.**

(g) **$ 1,500.00:** Loss on worthlessness of Lester McConkey note which became worthless in 1947. The loss was $3,000.00. The accountant took a deduction of $1,500.00 only (Exh. 2)

(Tr. of Test. 43, 722). The loss is deductible as a non-business bad debt. (Section 23(k), Internal Revenue Code) and taxpayer was entitled to take the loss deduction as a short-term capital loss under **Section 117(a)(2), Internal Revenue Code, 1939.**

(h) $.....: **Cash payments** for business expenditures for which there were receipts in the files of the Nursery (Tr. of Test. 686, 581, 582, 590). The amount is not ascertainable, but the evidence discloses that it ran into a great deal of money. These were not taken into account (Tr. of Test. 590-592).

(i) **$15,494.65:** The record establishes, when all deductions are properly allowed and overstatement of income is given effect for the year **1949,** the partnership sustained a loss in 1949 of $30,989.31. One-half of this loss is allowable as a deduction as a net operating loss carry-back on the individual return of defendant for the year **1947** (Section 122 of the 1939 Revenue Code and amendments) (see computation, Appendix pp. 1 and 2).

The only deductions allowed by Government's expert Mytinger in his computation, are the items e ($270.00) and f ($275.00) (Tr. of Test. 699-670).

There is additional evidence of expenditures made in cash for which no record was made for tires, repairs, gasoline, and other expenditures totaling several thousands dollars (Tr. of Test. 581,

589, 752, 780, 782), which were not taken as deductions.

There is conclusive evidence in the record that additional cash expenditures were made for which receipts were taken. Those receipts were found in the records in the possession of Hammond and later turned over to the Internal Revenue Agents. Neither the accountant, in preparing the return, nor the Government's expert in making his computation, gave effect to any of these cash disbursement.

Consideration of all of this testimony, all of which appears in the record as a part and parcel of the Government's case, demonstrates that defendant had not understated and underpaid his tax liability for the year 1947. On the contrary, he had greatly overpaid his tax liability for that year.

E

Re 1948

Count II of the indictment charges that defendant understated his tax liability for that year in the sum of $10,335.72.

The Government's experts computed the understatement of the tax liability for 1948 to be **$623.81,** giving effect to certain deductions which the income tax return did not reflect. This tax liability was computed by the expert as follows:

He determined a total partnership tax liability for the tax year 1948 based upon the joint return of the husband and wife to be $6831.38, whereas, the joint return showed a tax liability of $5,583.76, making an increase in the joint tax liability of $1,-247.62 and an increase in defendant's individual tax liability of $623.81 (Tr. of Test. 709-710).

This additional tax liability of $623.81 was based upon an alleged increase in net income of the partnership computed by the expert Mytinger in the sum of $3,422.33, being the difference between the partnership net income of $28,745.07, computed by the expert (Tr. of Test. 709), and $25,322.74 reported in the return, making the difference of $3,-422.23.

This computation did not give effect to the allowable deductions shown in the following summary:

Summary of Allowable Deductions Not Taken in 1948 Partnership and Individual Returns

(a) **$ 770.05:** Paid to Progressive Printing Co. for printing catalogs (Exh. 106-107, Tr. of Test. 760, 762, 781). The receipted bills (Exh. 107) showing payment **in cash** was found by the Revenue Agent in the records.

(b) **$20,000.00:** Payments in excess of that amount made to itinerant laborers in cash for which no record was maintained as heretofore demonstrated.

(c) **$22,000.00:** Loss sustained in 1948 on loan to Denton Construction Co. determined to be worthless (Tr. of Test. 495 to 499, 707). This loss was deductible as a short-term capital loss in full under **Section 23(k)(4) of the 1939 Internal Revenue Code** against one-half of the capital gain realized on the sale of timber lands to Dant & Russell (Coos Pacific Timber Co). $1,000.00 of the excess capital loss was also deductible against ordinary income for the year 1948. The excess of this loss over the capital gains in that year, are allowable as deductions against capital gains in the subsequent year 1949 and later years.

(d) **$ 4,250.00:** In 1948, capital stock of Producers Gas & Oil Co. became worthless. The purchase price of the stock was $8,500.00. This was a long-term capital loss, one-half of which was deductible against capital gains received in the same year. Accountant Hammond took, as a deduction, only $1,000.00 against ordinary income (Exh. 43). One-half of the capital loss was a proper off-set against the capital gain resulting from the sale of timber to Dant & Russell (Coos Pacific Timber Co.). $1,000.00 of the excess is deductible against ordinary income in the year 1948, and the additional excess should be carried over as a loss deduction against capital gains in 1949 and later years (Tr. of Test. 305-307, 312-313) (Exh. 50).

(e) $.....: **Cash payments** were made for merchandise in use by the business for which there were receipts in the files of the Nursery which were not taken into account. The amount is unascertainable, but the evidence discloses that the amounts were very substantial (Tr. of Test. 581-582, 590,592, 686).

(f) $ 100.99: Interest paid on 99 W. Motel contract (Tr. of Test. 704).

(g) $ 9.10: Collection charges paid to Bank on 99 W Motel contract (Tr. of Test. 704).

(h) $ 1,000.00: In the year 1947, taxpayer had a short-term capital loss of $3,000.00 arising out of non-business bad debt, worthlessness of Lester McConkey note. Since no capital gains were realized in 1947, $1,000.00 of this capital loss was deductible on Leo Elwert's return; $1,000.00 was deductible on Mary Elwert's return, and $1,000.00 should have been carried over as a capital loss carry-over to **1948** under **Section 117 of the 1939 Internal Revenue Code.** (Tr. of Test. 3, 722) (Exh. 2).

The only deduction allowed by Government expert Mytinger, was item f ($100.99) (Tr. of Test. 704), and item c, part of which was offset by the capital gain in 1948 on Dant & Russell timber sale (Tr. of Test. 707).

Neither did they give effect to deductions for the expenditures made in cash for which there were

written receipts in the records (Tr. of Test. 581, 589, 752, 780 to 782).

If effect is given to these deductions, the additional tax liability of $623.87 computed by the Government's expert, is entirely dissipated and shows that the taxpayer has paid a great deal more than his just tax liability for that year.

F

Re 1949

Count III of the indictment charges that in 1949 defendant had a net income of $9,007.81 on which there was a tax liability of $1,669.00; that he failed to make and file a return or to pay the said tax.

The Bill of Particulars as to Count III discloses and the testimony is to the same effect, that the items making up the alleged concealed income were not defendant's **individual** income, but were **partnership** "receipts".

The tax liability for the year 1949, as computed by the Government's expert Mytinger for 1949, was **$657.08** (Tr. of Test. 716). This computation was made on the basis that the partnership had ordinary net income of $9,176.04 and long term capital gain of $1,666.44 (Tr. of Test 715), one-half of which only would be taxable to defendant individually.

These computations were made by taking, as a starting point, the **unsigned** and **unfiled** partner-

ship return for the year 1949 prepared by the accountant Hammond. That return starts with a gross income of $175,849.60 (Exh. 45).

The record establishes conclusively by the Government's witnesses, Menlow, and Hammond, that this figure of gross income was an **overstatement of between $19,000.00 and $20,000.00.** The witness Hammond testified that he re-examined the same records from which he made up that income tax return and was unable to reconcile the figures appearing in the return with those recipts and that the difference was between nineteen and twenty thousand dollars. He could give no explanation for his inability to reconcile the return with the books and records from which he made the return. He was unaware of this discrepancy. It was called to his attention by Revenue Agent Menlow who re-examined the same records and made the computations and he discovered the discrepancy and called it to the attention of the accountant (Tr. of Test. 302, 326, 327, 577, 578).

Since the prepared return was inaccurate to the extent at least that it overstated the gross income, it was, of course, improper to make computations by taking that return as a starting point.

The elimination of this difference of $19,000.00 to $20,000.00 in gross income wipes out all of the net income upon which the Government's expert computed the tax liability of **$657.08** because the entire net income of the partnership was only $9,-

176.04 ordinary income and $1,666.44 long term capital gain.

The experts did not give effect to this reduction in gross income in making the computation resulting in the determination of tax liability.

The Government's expert did not give effect to the additional deductions shown in the following summary:

Summary of Deductions for 1949 Not Taken Into Account in Computation

(a) **$19,000.00 to $20,000.00:** The gross income shown on the unfiled partnership return for 1949 was **overstated** by the accountant to the extent of **$19,000.00 to $20,000.00** (Tr. of Test. 302, 326-327, 577-578).

(b) **$20,000.00:** Payments in excess of that amount made to itinerant laborers in cash for which no record was maintained as heretofore demonstrated.

(c) $ .....: Cash paid for business expenditures for which there were receipts in the files of the Nursery, but not taken into account. The evidence does not establish the amount, but it does establish that the amounts were very substantial (Tr. of Test. 581-582, 590-592, 686).

(d) $ **13.00:** Collection charge on Motel 99 W contract (Tr. of Test. 710).

(e) **$ 7,520.00:** Capital loss carry-over from 1948 resulting from worthlessness of the Denton Construction Co. bad debt loss (Tr. of Test. 495, 498, 707) and from the worthlessness of Producers Gas & Oil Co. stock (Tr. of Test. 305-308, 311-313).

(f) **$15,494.65:** Being one-half of the partnership operating loss for the year 1949 of $30,989.31, is available as a net operating loss deduction for the year 1947 already noted above (see computation Appendix pp. 5 and 6).

The only deduction taken into account by the Government's expert, was item d ($13.00) (Tr. of Test. 710).

The Government's case established that there was no tax liability for the tax year 1949.

G

Re Intent and Wilfulness

We submit that the record fails to establish the **"specific intent"** to defraud the Government, which is the very crux of a prosecution for attempt to evade the tax, by the degree of proof sufficient to establish such intent beyond a reasonable doubt.

We respectfully invite attention of the Court to the rules which have been laid down governing the sufficiency of evidence to establish the requisite intent to defraud.

In **Holland v. United States, 348 U.S. 121, 75 S. Ct. 127-137,** the Supreme Court held:

> "A final element necessary for conviction is willfulness. The petitioners contend that willfulness 'involves a specific intent which **must be proven by independent evidence** and which **cannot be inferred from the mere understatement of income.**' This is a fair statement of the rule." (Emphasis supplied).

In **Bloch v. United States, 221 F. 2d 786-789** (9th Cir.), this Court held:

> "Nor would filing a false return with any bad purpose supply the necessary intent. The bad purpose must be to evade or defeat the payment of the income tax that is due. Nor would filing a false return without a justifiable excuse or without ground for believing it to be lawful or with a careless disregard for whether or not one has the right so to do constitute in themselves the intent which is required under the section."

In **Wardlow v. United States, 203 F. 2d 884** (5th Cir), a case of prosecution for intent to evade tax under 145 (b), the Court held:

> "The **intent** involved in this offense is **not inherent in the act itself,** but is a specific intent involving bad purpose and evil motive and that specific intent must be proved by or clearly inferred from the evidence."

In **National City Bank of New York v. Helvering, 98 F. 2d 93** (2nd Cir.), the Court had under consideration an appeal from the Board of Tax Appeals which upheld a fraud penalty determined by the Commissioner. Judge Learned Hand, speaking for the Court said:

> "It is **not enough that he was defrauding his principal,** or knew that he was; **he must have**

meant also to defraud the Treasury. True, he knew that in one way or another he was doing just that, because the bonds were somebody's income, and nobody was paying a tax upon them; but it does not follow, because he was suppressing them so that the Prairie Company could not declare them,—though that may be an actionable wrong — that his return was fraudulent and made with an intent to evade his own tax." (Emphasis supplied).

In **Iley v. Commissioner of Internal Revenue, 19 Tax Court of the United States, 631,** the facts were strikingly similar to those in the case at bar so far as it involved the issue of fraud. There, too, the taxpayer was a farmer, member of a partnership, engaged in farming operations who conducted business in a manner and whose bookkeeping knowledge and experience was similar to that in the case at bar. The Court held:

"Van Fossan, Judge: The first issue involves the question of fraud. Fraud is never to be presumed. It must be proved by clear and convincing evidence. Moreover, the burden of proving fraud rests on the Government. Addressing ourselves to the facts established, we find abysmal ignorance on the part of the party charged with keeping petitioners' accounts; the business had grown from small beginnings to large proportions, but the capacity of the member of the firm keeping the books did not grow in proportion. He was a farm boy, with a high school education, who had neither training nor experience in keeping proper books. There is ample proof of inaccuracies in the books, most of them to the benefit of petitioners, some, however, of benefit to the Government. **Although the bookkeeping was inadequate by any**

standard, there is no evidence of intentional concealment or deliberate misrepresentation. The errors were patent to any one versed in accountancy. The petitioners were guilty of poor judgment in not having the books audited but poor judgment and ignorance are not tantamount to fraud. **There is lacking one essential element,** the very heart of the fraud issue, **namely, the intent to defraud the Government** by calculated tax evasion.

Although intent is a state of mind, it is nonetheless a fact to be proven by the evidence. **It must appear as a positive factor.** In determining the presence or absence of fraud the trier of the facts must consider the native equipment and the training and experience of the party charged. **The whole record is to be searched for evidence of the intent to defraud."** (Emphasis supplied).

In **Ferguson v. Commissioner of Internal Revenue, 14 Tax Court of the United States, 846,** on the issue of fraud, the Court held:

"Their sudden prosperity, alleged ignorance, and reliance upon others not fully informed, are inadequate excuses for their incorrect returns. They should have kept better records and they should have known that the net income reported was substantially less than their actual income from the restaurant. An investigation on their part could easily have disclosed the errors. A strong suspicion that Walter knew his income was more than he was reporting might arise from the record. **But suspicion of incredible ignorance or of actual knowledge on his part is not enough. Negligence, careless indifference, or disregard of rules and regulations would not suffice.** The petitioners dismissed their responsibility to file proper re-

> turns much too lightly. But the Commissioner, to support the fraud penalties, must prove by clear and convincing evidence that the taxpayers, or one of them, intended to defraud him. The evidence is not quite adequate to support that burden. **It shows no act intended to defraud** and, under all of the evidence, the **negligent omissions** to eliminate the duplications of deductions are **not the equivalent of an intent to defraud."** (Emphasis supplied).

The rule followed by the Tax Court on the issue of fraud should be applied with greater force in criminal cases.

In **United States v. Lindstrom, 222 F. 2d 761** (3rd Cir.), the Court held:

> "Admittedly **mere proof of understatement** of taxable income without other evidence of wilfullness **is insufficient** to **support a conviction** under section 145 (b) . . .
>
> . . . . .
>
> There is, therefore, in his case nothing more shown than that his returns understated his taxable income; not enough, as we have said, to support a finding of a wilful attempt to evade tax. His motion for a judgment of acquittal should therefore have been granted."

In **Morissette v. United States, 342 U.S. 246, 72 S. Ct. 240,** the Supreme Court held that

> "Knowledge, of course, is not identical with intent."

and that **"presumptive intent"** has no place in a criminal case.

In **United States v. Clark, 123 F. Supp. 608,** the Court held:

> "Assuming that there may have been actual underpayment of tax in the two tax years, which more careful auditing might have avoided, the offence charged in the indictment cannot be made out without proof of willful fraud or deceit."

In **United States v. Murdock, 290 U.S. 389, 54 S. Ct. 223-226,** the Supreme Court said:

> "Congress did not intend that a person, by reason of a bona fide misunderstanding as to his liability for the tax, as to his duty to make a return, or as to the adequacy of the records he maintained, should become a criminal by his mere failure to measure up to the prescribed standard of conduct."

In the case at bar, "knowledge" of alleged falsity itself **would have to be inferred from circumstances** for there is no direct evidence in the record that defendant had such knowledge. Consequently, "intent" to defraud cannot be inferred **from inferred knowledge.** It is settled beyond question that **a fact essential to conviction cannot be established by piling inference upon inference.**

See **United States v. Litberg, 175 F. 2d 20** (7th Cir.), page 28 this brief.

It was incumbent on the Government to establish in this case the deliberate purpose to defraud the Government. That is to say, in filing or causing the returns to be filed and the failure to file the return for 1949, that defendant was aware of and was conscious of the fact that he actually owed more tax than disclosed by the returns filed, that

he filed them deliberately to deprive the Government of a part of the revenue to which it was lawfully entitled, and that the failure to file the 1949 return was, likewise, deliberate and intended to accomplish the same evil purpose.

The Government introduced evidence of certain facts which, standing alone and unexplained, might tend to create suspicion of intent to defraud **someone,** but not necessarily to defraud the Government. This evidence, generally speaking, falls into two classes:

(a) The cashing of checks received in payment of merchandise or in connection with sale of capital assets, which were not deposited in the regular bank accounts of the Nursery and, therefore, not reflected in the returns prepared by the accountants;

(b) The carrying of two bank accounts by defendant under assumed names in 1949 only.

The question is, was this done for the purpose of defrauding the Government out of tax revenue, or for other purposes, lawful or unlawful?

Whatever suspicion these acts generated, was entirely **dissipated by the Government's own testimony** which is part and parcel of the Government's case.

For the purpose of determining whether the case should have been submitted to the Jury, we cannot reject the Government's evidence of an exculpatory character which dissipates the suspicion that would attach to these acts. It establishes as a

part of the Government's case, the **reasons and motives** for the commission of the acts. **(United States v. O'Malley, 131 F. Supp., 409).**

The exculpatory evidence, which is part of the Government's case, established that the cashing of the checks and the carrying of the bank accounts were wholly unrelated to any intent to defraud the Government of tax revenue.

The practices referred to were caused and induced by the difficulties that stemmed from defendant's unfortunate love affair with another man's wife, the threatened litigation, the actual litigation resulting therefrom, the dissention and estrangement that it created between defendant and his wife, his exclusion by his wife from the business and active participation and control of the finances of the business, and the appropriation of the bank accounts by his wife. The Government's evidence established that these conditions prompted the defendant to resort to the practices referred to above. The practices had no relation to any tax problems.

In addition to this exculpatory evidence, the record establishes beyond any shadow of a doubt that the defendant, as a part of the business, was compelled to have in his possession large sums of money in cash with which to pay itinerant farm labor amounting to more than $20,000.00 a year and that he cashed checks and used the currency which was expended for that purpose. This practice was

a lawful and legitimate and normal business practice as carried on by those engaged in farming operations in the vicinity in which the defendant's business was conducted and utterly destroys any suspicion or inference that might arise from the bare unexplained fact of the cashing of the checks and conclusively negatived the existence of any intent to defraud the Government out of revenue in pursuing the practice of cashing checks. This, too, was established by the Government's testimony as will be presently demonstrated and was corroborated by evidence introduced on behalf of the defendant.

The lack of the requisite intent to defraud the Government is also manifest from the Government's evidence which establishes that the defendant failed to take advantage of many thousand of dollars of the allowable deductions which has heretofore been demonstrated. If the deductions had been taken in these years in question, they would have wiped out all tax liability, to say nothing of the alleged unreported tax liability.

Consideration of the evidence of these allowable deductions which were not taken, demonstrates that the defendant was not tax conscious and not predisposed to engage in tax evasion or even tax avoidence.

The evidence demonstrates that he was a victim of his own ignorance, carelessness, and indifference to his own welfare and was a victim of grossly in-

competent, careless and indifferent accountants which resulted in loss to him.

It goes, without saying that a taxpayer who is predisposed to or bent on cheating the Government out of tax revenue, would not only avail himself of every lawful allowable deduction in reducing his tax liability, but would be disposed to make fraudulent claims to deductions. We find no such disposition on the part of the defendant in the case at bar. The failure to avail himself of the lawful deductions, destroys any implication of an intent to evade taxes.

His accountants were aware of the fact that monies were being expended for itinerant labor in cash for which there was no record. They tried to persuade defendant to maintain some records and called to his attention the fact that his failure to maintain such records was costing him money. His answer was that he was too busy. A taxpayer bent on cheating the Government or who is tax conscious, would have been quick to avail himself of his accountants' instructions and admonitions. This is not the conduct of a person who harbors the intent to cheat the Government.

In addition to the evidence of the allowable deductions which were not taken as heretofore demonstrated, we now call attention to some of the evidence which is part of the Government's case that explains defendant's conduct in the cashing of checks and the maintenance of bank accounts.

It is highly significant on the question of intent that the Government's witnesses Cook and Hammond, both testified that defendant did not at any time request them to understate his income or to overstate his deductible expense.

There is no evidence that he ever suggested that any ficitious entries be made in the books of account with respect to income or expense.

H

Synopsis of Testimony Bearing on Defendant's Intent

Government's witness Cook, accountant who prepared the 1947 return, testified that it was impossible to get Mary Elwert and defendant to keep a check register (Tr. of Test. 34). When the law suit for alienation of affections was threatened in the fall of 1946, the banking arrangements were changed (Tr. of Test. 35). The practice of the partners in keeping records created a "very unsatisfactory situation" from the accountant's standpoint (Tr. of Test. 36). Until the difficulty arose, (threatened law suit) the bank accounts were in their joint names (Tr. of Test. 37). He was never given any records or information with respect to the **cash** business expenses (Tr. of Test. 38). He complained to defendant that he should keep a record of his cash expenditures for deduction purposes, but he failed to do so and he could not get him to do it (Tr. of Test. 39); that defendant was

annoyed with the details of keeping a register of business expenses paid out in cash (Tr. of Test. 40). He regarded the accountant as a necessary evil (Tr. of Test. 41). Defendant was careless and loose in his accounting methods (Tr. of Test. 41). In 1947, the partnership paid State income tax for the year 1946. Defendant's one-half of the payment was $3,093.75. (This was an allowable deduction in 1947). He did not take the deduction in that year (Tr. of Test. 46). He did not take any depreciation on the motel owned by defendant for 1947 (Tr. of Test. 49); that defendant was in the habit of paying bills by endorsing and turning over a check received from a customer (Tr. of Test. 54); that he complained to defendant about the inability to take proper deductions by reason of the lack of information (Tr. of Test. 54). He knew of the practice of using itinerant labor (Tr. of Test. 62); that payments in cash were made by defendant to "Mexican labor, and people of that nature, directly." He asked defendant several times to have slips signed. Defendant told him, "they can't even sign their name." He told defendant that he needed such silps, "which will give me a basis on which to put that down as expense. But that was another thing I couldn't get him to do. He was too busy." (Tr. of Test. 63). He explained to defendant the importance of having a record of the cash disbursements; that it would affect his deductions which would be lost. The answer to that was that the men to whom the payments were made could not read or write

and it was difficult to get them (Tr. of Test. 64). The itinerant labor was not included in the State Industrial Accident Commission register (Tr. of Test. 68).

Government's witness Leo J. Hanley, an attorney, testified that in October, 1946, defendant was faced with litigation, a damage action. He succeeded another attorney named Asbahr who handled the matter prior thereto (Tr. of Test. 155-156).

Government's witness Schmidt, a friend of defendant, testified he cashed a number of checks for defendant, which are referred to in the Bill of Particulars, as an accommodation. The reason was, "He wanted the check divided into smaller amounts so he could take care of some Winos and help he had." (Tr. of Test. 164). He testified: "Well, it seemed like at that time he was having some difficulties with his wife, and that his bank account had been attached, or she had taken it out, or something. I don't recall just what the circumstances were . . . He was putting money in that name so he would—his own money. In other words, that money he put in that name he could get in touch with (Tr. of Test. 182). . . . I don't know just how it happened there, but apparently he didn't have any more access to any bank account that he had before (Tr. of Test. 183. He testified: "Q. And I think you further made the statement that you cashed the checks because he was in need of getting funds to take care of Winos and labor. Will you explain what you mean by

Winos, Mr. Schmidt. A. Well, I suppose it was a bunch he picked up down in skid row. He sent in a truck or two trucks a day for help, and the way I understand he had to pay them in cash, so he required money every day to take care of that intinerant help. Q. Was this particularly during the harvest season and the planting season of the year? A. Yes (Tr. of Test. 189), it was Leo Elwert's practice to do that." It was his understanding that Leo Elwert's account that he had formerly used in Tigard had been closed and was not accessible to him for some reason and that he was having trouble with his wife. That was the reason for handling the checks in the way that he described and the advancing of money to him from time to time (Tr. of Test. 190-191). The cash resulting from the $12,-750.00 check was used for those purposes (Tr. of Test. 193). At a later time, he learned that defendant had troubles at home with regard to law suits and with his wife Mary (Tr. of Test. 194).

Government's witness Bernstein, at attorney who was associated with the witness Leo Hanley in representing defendant in connection with the law suit for alienation of affections, testified that the check he received in part payment of the fees was signed by Mary Elwert (Tr. of Test. 208). The reason was that defendant could not sign checks (Tr. of Test. 210). The difficulty started with a demand for $30,000.00 damages, which resulted in the law suit and was settled in May 1947 (Tr. of Test. 211).

Government's witness Hammond, the accountant who prepared the 1948 and 1949 returns, testified that the records of the nursery were "very crude", but they were not any more so than the average farmer (Tr. of Test 237). What he found in the way of records, was what would be found in connection with the average farmer's operation (Tr. of Test. 238). Defendant was around the place of business very infrequently. He always had difficulty in contacting him (Tr. of Test 255). He learned from the Internal Revenue Agent that there had been cash disbursements for expenses of the Nursery that no record was kept of (Tr. of Test. 256). In reporting the sale of the 99W Motel, defendant took a less favorable income tax position than he was entitled to. He reported the sale on a cash instead of installment basis (Tr. of Test. 260). He criticized Cook, the former accountant, for not having done so (Tr. of Test. 260-261). The whole bookkeeping system there was a pretty loose proposition (Tr. of Test. 277). He recognized that there were in the records submitted to him many receipts for cash payment made by the Nursery, but he did not take them into account as deductions. He only took as deductions payments that were made by check (Tr. of Test. 281). He testified that there was an overstatement of gross income in the partner ship return which he prepared for 1949. The return showed gross receipts of $173,319.76 and the records from which he made the return, showed $158,316.75 (Tr. of Test. 292). He re-examined the

books of account from which he made the returns nad was unable to reconcile the return with the records and could give no explanation for the discrepancy. The **overstatement of income was between nineteen and twenty thousand dollars** (Tr. of Test. 298, 301, 302, 325, 326, 327). He failed to give effect to loss carry-overs resulting from the loss of the capital asset in the amount of $8,500.00 (Tr. of Test. 305-306).

Defendant did not request or encourage the taking of deductions. The matter of deductions was never discussed (Tr. of Test. 310). He had full charge of the situation and the defendant left the matter entirely up to the accountant (Tr. of Test. 311). He was unable to explain why the carry-overs resulting from the $8,500.00 loss were not made (Tr. of Test. 313). He gave no effect to the bank account in the Tigard Branch of The United States National Bank in making the tax computation (Tr. of Test. 318). He admitted that he did not examine the additional records that were available at the offices of the Nursery in making up the returns and that he made the returns only from the bank statement and bank checks that were delivered to him (Tr. of Test. 329).

Government's witness Schmitz, Assistant Manager, Citizens Branch, The United States National Bank, testified that interest was paid out by the Bank for the defendant's account in connection with the purchase of the motel (Tr. of Test. 350), but

the interest was never taken as a deduction in the income tax return.

Government's witness Palmer, Assistant Manager of the Tigard Branch of The United States National Bank, testified that the nursery account at that Bank was closed on November 9, 1946, and immediately re-opened in the name of Mary Elwert alone (Tr. of Test 359). The amount that was transferred was $26,099. 59 (Tr. of Test. 410). Thereafter, the business of the Nursery was carried on through Mary Elwert's account (Tr. of Test. 420). For a time the Bank was authorized by Mary Elwert to permit Leo Elwert to draw small sums to be deposited in the labor account to pay laborers who were normally paid by check, but Mary Elwert cancelled out this authority (Tr. of Test. 455-456).

Government's witness Maynard, Assistant Manager of Pacific First Federal Savings & Loan Association (the Bank in which defendant carried two accounts under an assumed name) testified that defendant had maintained a personal account at that Bank in his own name for some time. There was $16,665.00 in that account (Tr. of Test. 478). In January 1949, defendant told Mr. Maynard he wanted to withdraw this account. He was concerned about the possibility of someone identifying his account,

> "And I made the suggestion that if he wanted to have an account in an assumed name, that was possible." (Tr. of Test. 479-480).

He told defendant it was possible to have an account in an assumed name; that they had other accounts carried that way, and a few days later defendant came back and changed the account to the name of "Schamburg" (Tr. of Test. 480-481).

This is where the idea of carrying a bank account in an assumed name originated. The reason therefore appears in the testimony of the Government's witness Asbahr which follows. Mr. Asbahr, an attorney, testified with respect to that matter:

> "Q. What was Mr. Elwert's position about this time in the fall of 1948 with reference to his marital situation with Mary Elwert, if you know?
>
> A. Well, of course, he had a good deal of domestic trouble and had left his home, I think, before this time." (Tr. of Test. 490).

The trouble involved itself into a divorce action which was brought in the State of Idaho. Someone in his office served the papers on Mary Elwert (Tr. of Test. 491).

Defendant consulted with Mr. Asbahr, Government's witness about changing the bank account with the Pacific First Federal Savings & Loan Association in which he had the $16,000.00. Mr. Asbahr testified:

> "A. Well, he was complaining at that time that, due to domestic trouble, his wife Mary had control of most of the funds, and he had great difficulty doing business, and he was attempting to hold some money of his own, but he was afraid he might have it attached,

or something of that type. He told me that he had been up to the Savings & Loan Association and they had told him that he could use an assumed name, and he asked me whether that was legal or not, and I told him Yes, if it was agreeable to the Savings & Loan people it was legal, providing, of course, he was not deceiving anybody.

Q. Did he then act upon your advise and the advise that had been given him by Mr. Maynard and make that transfer?

A. I presume he did. I didn't follow it up.

Q. You don't know what he did?

A. I don't know. I didn't follow it up.

Q. But you recall definitely that he discussed it, do you?

A. Yes, he counseled with me about it." (Tr. of Test. 492-493).

Mr. Asbahr also testified that defendant turned over some checks to him which he received from the sale of some timber land and some other funds and **he explained the reason** therefor as follows:

"A. At the time I believe the purpose was for me to hold this money temporarily, and later he was going to have it applied on account of some other transactions that he was interested in. Incidentally, he had domestic troubles at that time, and he was complaining that his wife had most of the funds and he was unable to do business the way he wanted to on account of not having access to the former funds." (Tr. of Test. 485).

Defendant's troubles started between the 15th and 25th of September 1946 when he received a threatening letter from an attorney representing Bloomquist who was demanding damages for the

alienation of his wife's affections (Tr. of Test. 494-495).

Government's witness Asbahr testified that during the year 1948, defendant sustained a loss of $22,000.00 which represented part of the funds alleged to be unreported partnership income. Defendant, through Mr. Asbahr, loaned to Denton Construction Company $22,000.00 in 1948 for which he received promissory notes (Tr. of Test. 495-496). The Construction Company became insolvent in September 1948, it defaulted on its contract with the Bonneville Power Company. It "blew up" in September 1948, and the bonding company took over the job. Asbahr informed the defendant in October 1948 that the loan was a total loss (Tr. of Test. 496, 497, 498, 499).

This loss was not taken as a deduction in 1948. The Government's expert, in making his computation, recognized that it was an allowable deduction.

Government's witness Menlow, Internal Revenue Agent, testified that he had made the investigation of the defendant's returns; that he was unable to reconcile the gross receipts shown on the 1949 partnership return prepared by Hammond with the books of account (Tr. of Test. 578). He found various records showing monies paid out in cash for merchandise (Tr. of Test. 581), but he made no tabulation of these expenses, nor did he take them into account. **He only took into account expenses**

"verified by check" and **that was the method used by Hammond (Tr. of Test. 582).** He saw in the records the invoices of the Progressive Printing Co. which showed that payment was made in 1948 in cash for printing (Tr. of Test. 583-584). But these expenditures were not taken as deductions by Hammond and were not given effect by the Government's expert in computing taxable income. He testified: "we had evidence showing that cash expenses were incurred" (Tr. of Test. 590), but they were not taken into account as deductions in making their calculations (Tr. of Test. 590-591). The system of keeping records and doing business at the Nursery was so careless and loose, that when the Revenue Agent Menlow took possession of the records from Hammond, they found United States money orders in the record which had not been cashed (Tr. of Test. 599). In making his examination, he found evidence of the payment of income taxes to the State of Oregon for the tax year 1946 paid in 1947, which were allowable deductions, but he did not give effect to this deduction. He testified: "Q. Weren't you interested in any other deductions that they might have? A. No, sir. Q. You were not interested? A. Not at all, sir." (Tr. of Test. 603).

Menlow knew that the gross income for 1949 was overstated and called the matter to the attention of the accountant Hammond and questioned him about it (Tr. of Test. 325-326). Hammond became aware of the over-statement for the first time

when Menlow called it to his attention (Tr. of Test. 327).

Government's witness Kuhn, Revenue Agent, testified that in 1947, 1948 and 1949, all checks on the business account were drawn by Mary Elwert (Tr. of Test. 689).

Government's witness Mytinger, Revenue Agent, who gave expert testimony as to the computations, testified that in making the computations, he assumed that the gross income for the year 1949 was not less than the amount reported in the return prepared by Hammond (Tr. of Test. 710, 711, 712, 713, 714). **He did not deduct from the gross income,** the **over-statement of nineteen to twenty thousand dollars** in the **gross income.** The testimony which he gave as to that computation, was admitted over defendant's objection that it was based upon an erroneous assumption or a hypothesis for which there was no foundation in fact. The admission of this evidence was clearly erroneous.

The evidence digested above, all of which is part and parcel of the Government's case, demonstrates that the defendant did not, and could not, have had the evil intent and wilfull purpose to avoid or evade any part of his income tax. That whatever discrepancies there are, were due to carelessness, negligence, incompetence of himself and his accountants, which resulted to his great detriment and

that he, in fact, overpaid his tax liability rather than underpaid the same.

I

Re Fatal Variance

There is a fatal variance between the allegations of the indictment and the proof admitted over the defendant's objections in support of the indictment.

Counts I and II of the indictment charge that defendant attempted to evade the tax by filing a return which understated "his" tax liability.

Count III of the indictment charges that defendant attempted to evade the tax by failure to file **his** income tax for 1949 although **he** had taxable net income, and the failure to pay the tax which "he owed" the Government. All of the three counts relate to defendant's **individual tax liability.**

The Bill of Particulars relating to Counts I and II (Tr. of Rec. 10, 11) purports to tabulate the specific items of defendant's individual "unreported gross income." **The Bill of Particulars relating to these two counts, does not recite that the enumerated items were the gross income or receipts or net income of the partnership.**

The Bill of Particulars relating to Count III (Tr. of Rec. 13) purports to tabulate defendant's individual income upon which the existence of a tax liability is to be computed. The Bill of Particu-

lars does not recite that the enumerated items were partnership "receipts", partnership "gross income", partnership "net income" or that it represented defendant's distributive share of the partnership net income.

Neither the indictment, nor the Bill of Particulars, charged that defendant attempted to evade the tax by the filing of a false **partnership information return** which understated the individual partners' distributive share of the partnership net income.

All of the evidence introduced by the Government with respect to the items enumerated in the Bills of Particulars established beyond a shadow of a doubt that each item constituted **partnership** "receipts."

The admission of this evidence was objected to from the very beginning and throughout the trial. It was admitted over the objections. At the close of the Government's case, a written motion was filed to strike this evidence (Tr. of Rec. 27 to 29, and Tr. of Test. 727). The objections were overruled.

The objection made at the inception of the trial is typical of the objections made throughout the trial. When the 1947 partnership return was offered in evidence, objection was made on the ground that it was not executed by the defendant and on the further ground that the indictment does not

charge any falsity or fraud in connection with the filing of the partnership return, and the indictment charges only that defendant's return did not correctly record his income (Tr. of Test. 12, 13).

Similar objections were made when evidence of each of the items of partnership receipts were offered in evidence. Typical of such objections, is the objection made when the first check was offered in evidence (Tr. of Test. 69). Objection was made on the ground that

> "it represents income to the partnership rather than to Leo Elwert . . . . There is no claim or allegation in any of the counts with respect to error or omission or fraud in connection with the partnership returns, and for the further reason that the testimony of the witness demonstrates that the proceeds of this check represent gross receipts rather than gross income . . . "

When the objection was overruled, after considerable discussion, a stipulation was entered of record that a continuing objection may be deemed made to each check as it will be offered to avoid the necessity of repeating the objection (Tr. of Test. 76). Nevertheless, the objection was frequently repeated throughout the trial. The admission of this evidence of partnership returns and partnership receipts, was reversible error.

So far as the indictment and the Bills of Particulars are concerned, the defendant's **individual returns** were accurate and truthful insofar as they stated his distributive share of the partnership net

income and the only falsity charged was in the failure to add thereto the items of alleged additional income enumerated in the Bills of Particulars which, according to the indictment and Bills of Particulars, constituted defendant's **individual** additional income.

The defendant had the right to assume that he was to be tried for the failure to include items of **individual income** and not upon a charge that there was a falsity in the statement of his distributive share of the partnership net income as set up in the returns. He had the right to assume that that figure would not be challenged and that he would be called upon only to defend himself against the charges that the specific items enumerated in the Bills of Particulars were his individual income which he intentionally and knowingly omitted from his **individual** return.

A charge of falsity in the partnership information return requires entirely different evidence from the charge of falsity in the partners' individual return in the absence of an allegation in the indictment that the falsity in the individual return consists of an understatement of the partnership net income and defendant's distributive share of said partnership net income.

The items enumerated in the Bills of Particulars consisted of "receipts" (not net income) by the partnership from the sale of partnership merchandise and from the sale of partnership capital assets.

Evidence of "receipts" alone does not constitute evidence of "net income". There is no presumption that the amount received from a sale is all profit. Only the profits from the sales are taxable.

Section 22(a) of the Internal Revenue Code defines "gross income" as "gross, profits . . . derived from . . . sales. . . ." The receipts less the cost of sales constitute the "gains" or "gross income."

That profit is not determined from the profit or loss on each individual sale, but is determined from the entire year's operations, by taking the difference between the **sum total of all sales** and the **sum total of cost of the sales** plus the additional deductions for overhead, operating expenses, and other business deductions.

In the case at bar, while all the evidence introduced in connection with the enumerated items showed that they constituted partnership "receipts" only, the Government did not introduce any evidence that any profits resulted therefrom to the partnership. There was no evidence of cost of sales with respect to these items or of any other of the normal deductions which would enable the Court or Jury to determine that profits were, in fact, derived therefrom.

The evidence of **partnership** "receipts" or "gross income" was a fatal variance from the allegations of the indictment and the Bills of Particulars.

As was said in **Hartman v. United States, 215 F. 2d 386** (8th Cir.):

"The proof ought to have been confined to that charge.

. . . . .

His right was to be tried for the specific offense charged against him."

In **Epstein v. United States, 174 F. 2d 754** (6th Cir.), the Court held:

"A defendant in a criminal case is entitled to know what he is charged with; and he is **entitled to be tried on the charges brought against him.** Bratton v. United States, 10 Cir., 73 F. 2d 795; United States v. Wills, 3 Cir., 36 F. 2d 855.

. . . . .

The charge in the indictment was entirely different from the accusation of breach of trust through receipt of secret profits by a director. There was, therefore, a fatal variance between the allegations in the indictments and the proofs. Walker, et al. v. United States, 4 Cir., 104 F. 2d 465; United States v. Byers, et al., 2 Cir., 73 F. 2d 419; Fox v. United States, 7 Cir., 45 F. 2d 364; United States v. Willis, supra. On the motion of appellants, **the trial court should have entered a judgment of acquittal on the ground of fatal variance; and its refusal to do so was error.**" (Emphasis supplied).

The defendant was not tried on the issue tendered by the indictment and his plea of not guilty. **He was tried on the issue of the truth or falsity of the partnership net income without any allegation putting the same in issue.**

We have found no case in the books, after diligent search, in which a conviction of a partner was sustained upon an indictment which charged un-

derstatement of his **individual** net income and tax liability, without allegations in the indictment charging falsity with respect to the partnership return and willfullness, knowledge, and intent of the individual partner with respect to the partnership return.

In **Levin v. United States, 5 F. 2d 598** (9th Cir.), this Court affirmed a judgment of conviction of a partner, but in that case, the indictment charged falsity in the "partnership income returns."

In the case at bar, the Court below went so far as to permit the defendant to be tried on an alleged false partnership return for the year 1947, **which he did not even sign and without a scintilla of evidence that he was aware of its contents or that he was even aware that it had been filed.**

The allegations of the indictment were limited by the scope of the two Bills of Particulars. The effect of the Bills of Particulars upon the indictment is clearly stated in the following two cases:

In **United States v. Neff, 212 F. 2d 297** (3rd Cir.), the Court held:

> "Bills of particulars in criminal cases in federal courts are governed by Rule 7(f) of the Federal Rules of Criminal Procedure, 18 U.S.C., which is substantially a restatement of well-settled principles. The latter establish that that a bill of particulars 'Once obtained . . . **concludes the rights of all parties** who are to be affected by it, and he who has furnished the bill of particulars under it, **must be confined to the particulars** he has specified, **as**

> **closely and effectually as if they constituted essential allegations in a special declaration'.** Otherwise stated, a **bill of particulars strictly limits the prosecution to proof within the area of the bill."** (Citing numerous cases)

In **Bryan v. United States, 175 F. 2d 223** (5th Cir.), the Court held:

> "Two bills of particulars filed by the United States Attorney **limit** the **alleged evasions** to understatements of the gross receipts derived from the business operated by Appellant in each of the years. No claim is made that the deductions from the income tax returns of the Appellant were unallowable, ficitious, or false. **Measured, as the proof must be, by these bills of particulars,** the conviction must stand or fall upon the proof, or lack of proof, of false statements knowingly made for the purpose of evading income taxes in the returns of gross business receipts for the years in question."

In the case at bar, the Bills of Particulars alleged the specific items enumerated therein to be defendant's income. The proof established that they were **partnership** "receipts".

The Bills of Particulars alleged that the items were "gross income"; "taxable income"; "concealed gross income"; "adjusted gross income", and other terms indicating that they represent "taxable net income", whereas, the evidence established that all of the items were merely "receipts" to the partnership.

We submit that the variance between the indictment and the proof is fatal and that the mo-

tions for judgment of acquittal should have been granted for failure of proof of the allegations under the indictment.

J

It was the Duty of the Court Below to Grant Defendant's Motions for a Judgment of Acquittal as to each of the Counts of Indictment upon the Record in this Case

At the conclusion of the entire case, there was in the record substantial, if not conclusive, evidence which was consistent with the innocence of the defendant. This evidence came from the Government's witnesses for whose credibility the Government vouched when it called them to the witness stand and is an integral part of the Government's case. No question of the credibility of the witnesses is presented by the record. The exculpatory testimony they gave, cannot be rejected. It must be considered in connection with the evidence they gave from which the Government attempts to draw unfavorable inferences.

The presence in the record as a part of the Government's case of this exculpatory evidence, precluded the submission of the case to the Jury under the authorities which will be presently cited.

The exculpatory evidence negatived the existence of any criminal intent. It demonstrated that whatever inaccuracies may exist in the defendant's

returns, and the failure to file the 1949 return, were the result of: Carelessness, ignorance and incompetence of his accountants who had the responsibility of preparing the returns, and of the defendant's own ignorance, carelessness and indifference even to his own financial welfare to such an extent that he failed to avail himself of the many allowable deductions which, if taken and given effect, wipes out any tax liability in excess of the amount reported.

There is, in reality, little or no question of fact. The case involves, in the last analysis, a question as to the inferences to be drawn from the facts testified to by the witnesses and shown by the exhibits.

Under these circumstances, the rule is well settled that the presence of the exculpatory evidence, especially when it is an integral part of the Government's case, makes it the duty of the Trial Court to sustain the motions for a judgment of acquittal.

In **Holland v. United States, 348 U.S. 121, 75 S. Ct. 127** (a tax evasion case), the Supreme Court enunciated the principle that when the Government's Agents investigate the tax liability of a taxpayer, and in the course of investigation come across "leads" to evidence that "would establish the taxpayer's innocence," they cannot ignore them and build up a case against the taxpayer as though the exculpatory evidence was non-existent., They

must "track down the leads" and ascertain the facts and if that is not done and the evidence of such investigation is not given, "the Government's case (is) insufficient to go to the jury." In short, the Supreme Court placed upon the Government the burden of investigating the exculpatory leads and introducing the evidence pertaining thereto to avoid unjust conviction. The Court held:

> "When the Government rests its case solely on the approximations and circumstantial inferences of a net worth computation, the cogency of its proof depends upon its effective negation or reasonable explanations by the taxpayer inconsistent with guilt. Such refutation might fail when the Government does not track down relevant leads furnished by the taxpayer—leads resonably susceptable of being checked, which, if true, would establish the taxpayer's innocence. When the Government fails to show an investigation into the validity of such leads, the trial judge may consider them as true and the Government's case insufficient to go to the jury. This should aid in forestalling unjust prosecutions, and have the practical advantage of eliminating the dilemma, especially serious in this type of case, of the accused's being forced by the risk of an adverse verdict to come forward to substantiate leads which he had previously furnished the Government. It is a procedure entirely consistent with the position long espoused by the Government, that its duty is not to convict but to see that justice is done. . . . . "

In the case at bar, the Government's Agents did not volunteer any exculpatory evidence. On cross-examination, however, they admitted that in mak-

ing the investigation, they came upon evidence which, if given effect, would minimize and reduce the defendant's tax liability. They came across receipts for cash payments, but refused to check them and ascertain the facts so that proper deduction might be made therefor. They became aware that large expenditures were made by payment in cash to itinerant laborers for which no deductions were taken. They did not investigate this matter and give effect thereto. They found in the records, receipted bills from the Progressive Printing Co. showing payments in cash in sums of $500.00; $779.00 and $3,429.00, but they gave no effect thereto. They learned that there was an over-statement of the gross income of the partnership in the 1949 return to the extent of $19,000.00 to $20,000.-00, but gave no effect thereto. These are mentioned here by way of illustration merely.

Under the principles laid down by the Supreme Court in the **Holland case,** a judgment of conviction should not be allowed to stand upon testimony of Government's Agents who ignored the principles laid down by the Supreme Court.

In Maryland & Virginia Milk Producers Ass'n v. United States, 193 F. 2d 907 (Ct. App. D. C.), the Court held:

> "It is still the law that there can be no conviction of crime **on circumstantial evidence** unless the only possible inference to be derived from it is that of guilt. **There must be evidence which forecloses and makes impossible any other conclusion."** (Emphasis supplied).

In **Hammond v. United States, 127 F. 2d 752** (Ct. of App. D.C.), the Court held:

> " 'Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt it is the **duty** of the trial judge to instruct the jury to return a verdict for the accused, and where all the substantial evidence is as consistent with innocence as with guilt it is the **duty** of the appellate court to reverse a judgment against him.' Isbell v. United States, 8 Cir., 227 F. 788, 792." (Emphasis supplied).

In **Wesson v. United States, 172 F. 2d 931** (8th Cir.), the Court held:

> "The evidence is entirely circumstantial.
>
> . . . . .
>
> To sustain a finding of fact the circumstances proven must lead to the conclusion with reasonable certainty and must be of such probative force as to create the basis for a legal inference and not mere suspicion. Circumstantial evidence, even in a civil case, is **not sufficient** to establish a conclusion where the circumstances are **merely consistent** with such conclusion **or** where they **give equal support to inconsistent conclusions.**
>
> . . . . .
>
> **Defendant's testimony fully explains the only discrepancies** that appeared in any of his prescriptions covering the entire time in controversy. The cases cited to support the government's theory here were cases in which the purchase and possession of extraordinary quantities of narcotices were unexplained. Certainly, **the proven circumstances were as consistent with innocence as they were with guilt, and inferences may not be drawn from inferences.**
>
> . . . . .

> The circumstances as they stand out in the record are consistent with the direct, uncontradicted and unimpeached testimony of the defendant and his witness. **Mere suspicion raised by the circumstances proved would not sustain a conviction, especially when such suspicion is removed by uncontradicted evidence."** (Emphasis supplied).

In **Curley v. United States, 160 F. 2d 229** (Ct. App. D.C.), the Court discussed at considerable length the functions of the trial court on motion for judgment of acquittal and after reviewing numerous cases, said:

> "Then, still later, the Circuit Court of Appeals for the Eighth Circuit, relying for authority upon People v. Bennett, United States v. Babcock, United States v. Hart, and United States v. McKenzie, **reversed** a judgment for **failure** of the trial court **to direct a verdict** and recited the following as **controlling upon the court in acting upon the motion:** 'Circumstantial evidence warrants a conviction in a criminal case, provided it is such as to exclude every reasonable hypothesis but that of guilt of the offense imputed to the defendant; or, in other words, the facts proved **must all be consistent with** and point to his **guilt only and inconsistent with his innocence.** The hypothesis of guilt should flow naturally from the facts proved and be consistent with them all. If the evidence can be reconciled either with the theory of innocence or of guilt the law requires that the defendant be given the benefit of the doubt and that the theory of innocence be adopted.' " (Emphasis supplied).

In **United States v. Outer Harbor Dock & Wharf Company, 124 F. Supp. 337, Judge Yankwich** quoted

from Hammond v. United States, 127 F. 2d 752, the following:

> " 'the judge **cannot let a case go to the jury** unless there is evidence of some fact which to a reasonable mind fairly **excludes the hypothesis of innocence.** The statement refers to the requisite **presence** of **evidence,** and **not** to the **absence** or **effect of other evidence.** The second part of the quoted statement means that **if,** upon the whole of the evidence, a **reasonable mind must be in balance as between guilt and innocence, a verdict of guilt cannot be sustained.'**

He went on to say:

> "These criteria have the approval of our own Court of Appeals. (citing **Stoppelli v. U. S., 183 F. 2d 391** (9th Cir.).
>
> In determining whether there exists the balance between guilt or innocence, of course, the Court may draw inferences from admitted facts, **but inferences upon inferences cannot be made.** As said by the Court of Appeals for the 8th Circuit:
>
> 'As said by us in Nations v. United States, 8 Cir., 52 F. 2d 97, 105, in an opinion by Judge Stone: 'Such **double inferences** are too remote to constitute evidence. As said by the Supreme Court in United States v. Ross, 92 U.S. 281, 283, 23 L. Ed. 707: 'They are inferences from inferences; presumptions resting on the basis of another presumption. Such a mode of arriving at a conclusion of fact is generally, if not universally, inadmissible. No inference of fact or of law is reliable drawn from premises which are uncertain.' ' " (Emphasis supplied).

In **Vick v. United States, 216 F. 2d 228** (5th Cir.), the Court held that in a case based upon cir-

cumstantial evidence, there can be no conviction where

"One motive is about as likely as another."

In **United States v. Maghinang, 111 F. Supp. 760,** the Court said:

> "In this circuit, it is clear that 'In order to justify a conviction of crime on circumstantial evidence it is necessary that the directly proven circumstances be such as to exclude every reasonable hypothesis but that of guilt,' United States v. Laffman, 3 Cir., 1945, 152 F. 2d 393, 394; United States v. Tatcher, 3 Cir., 1942, 131 F. 2d 1002, 1003; United States v. Russo, 3 Cir., 1941, 123 F. 2d 420, 423, or, as it has been otherwise stated by many courts in this circuit, 'Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the **duty** of the trial court to instruct the jury to return a verdict for the accused.' " (Citing cases).

Under these authorities, it was clearly the duty of the Court below to grant defendant's motions for judgment of acquittal as to each count of the indictment.

SPECIFICATION OF ERROR NO. III

The Court below erred in giving to the jury the instructions hereinafter set forth.

ARGUMENT

A

The Court gave, among others, the following instructions to the jury:

> "Every person subject to income tax, except persons whose gross incomes consist solely of salaries or wages for personal services, or arise solely from farming, is required to keep such permanent books of account or records, including inventories, as are sufficient to establish the amount of the gross income and the deductions, credits, and other matters required to be shown in any income tax return." (Tr. of Test. 858).

Exception was taken to this instruction as follows:

> "We except to the portion of the charge in which your Honor instructed the jury that there was a duty to keep records and the consequences of the failure to do so, on the ground that that issue was not in the case. There is no charge in the indictment of a violation of that section of the Internal Revenue Code, and it is not made an offense not to do so." (Tr. of Test. 874).

The instruction that the defendant was under that duty was bound to carry with it the implication that failure to keep such records was a violation of law and that the Jury could predicate an

intent to evade the tax upon such failure to keep records. The Jury was not told, in this connection, that if the failure to keep such accounts was due to carelessness, ignorance or inadvertence of the defendant or his accountants, no adverse inference could be drawn therefrom.

In **United States v. Murdock, 290 U.S. 389, 54 S. Ct. 223,** the Court held:

> "Congress did not intend that a person, by reason of a **bona fide** misunderstanding as to his liability for the tax, as to his **duty to make a return,** or as to the **adequacy of the records** he maintained, should become a criminal by his mere failure to measure up to the prescribed standard of conduct. And the requirement that the omission in these instances must be willful, to be criminal, is persuasive that the same element is essential to the offense of failing to supply information."

The giving of that instruction introduced an issue foreign to the indictment. None of the counts in the indictment charged attempted evasion by wilfully failing to keep books of account. It is well settled that the giving of an instruction that introduces a foreign issue is erroneous even though the instruction itself may state a correct rule of law.

In **Union Pacific R. Co. v. Garner, 24 F. 2d 53** (8th Cir.), the Court of Appeals reversed a judgment on the ground that an instruction was given that was not based upon the issues in the case. The Court held:

> "The rule is too well settled to require the citation of authorities that instructions should

be confined to the issues made by the pleadings."

This rule should be applied with greater strictness in criminal cases.

In the case at bar, there was no failure to keep records. Records were actually kept at the office of the Nursery and by its accountants. The evidence does establish that the records as kept were inaccurate and that the inaccuracies were due to the carelessness and negligence of the defendant and his accountants. The inaccuracies did not consist solely of the omission of items of income. The inaccuracies consisted in the **failure to record a great many deductible expenditures** running into the many thousands of dollars. Defendant gave no attention to the recording of these deductible expenditures and the accountants, although aware that such expenditures were being made, made no effort to reflect these deductible expenditures in the records and in the returns. So that we do not have a case of failure to keep records. We have here a case of the keeping of records which were inaccurate to the great detriment of the defendant. The evidence did not warrant the giving of the instruction referred to above.

There is a very serious question, to say the least, as to whether the charge is a correct statement of the law in any event. Section 54 of the Internal Revenue Code provides that:

"Every person liable to any tax . . . shall keep

> such records . . . make such returns, and comply with such rules and regulations as the Commissioner . . . may from time to time prescribe."

The Regulation promulgated pursuant to this Act, is **Regulation No. 111, Section 29.54-1.** It provides, so far as applicable:

> "Every person subject to the tax **except** persons whose **gross income** (2) **arises solely from the business of growing and selling produce of the soil** shall . . . keep such permanent books of account . . . as are sufficient to establish the amount of the gross income and the deductions, credits, and other matters required to be shown in any return under chapter 1."

Defendant's income, except for the one or two isolated transactions resulting in capital gain, consisted **of farming** and is exempt from the operation of the Regulation.

There is no statute defining the failure to keep records as a criminal offense.

The only relevant statute would be Section 145(a) of the Internal Revenue Code which provides that:

> "Any person required under this chapter to pay any . . . tax or . . . make a return . . . who wilfully fails to . . . make such return or declaration, keep such records, . . . required by law or regulations, shall, . . . be guilty of a misdemeanor."

It may be conceded for the purpose of argument, that the failure to keep records, may con-

stitute a **misdemeanor,** under Section 145(a) of the Internal Revenue Code. But **the indictment in this case does not charge any offense under Section 145(a).** If it did, the prosecution would be **barred by the statute of limitations.**

Under the **Spies Case, 317 U.S. 492, 63 S. Ct. 364,** violation of Sub-division (a) would not constitute a violation of Sub-division (b), whether it be failure to file a return or failure to keep records.

B

The Court instructed:

> "Of course, it is not necessary for the prosecution to prove knowledge of the accused that a particular act or failure to act is a violation of law. Everyone is held to know what the law forbids and what the law requires." (Tr. of Test. 859).

Exception was taken to this instruction as follows:

> "We except to the portion of the charge in which the Court instructed the jury that it was not necessary to prove that the defendant had knowledge that he was violating the law." (Tr. of Test. 874).

In **Direct Sales Co. v. United States, 319 U.S. 703, 63 S. Ct. 1265,** the Court held:

> "Without the knowledge, the intent cannot exist."

And in **Morissette v. United States, 342 U.S. 246, 72 S. Ct. 240,** the Court held that

> "Knowledge, of course, is not identical with intent."

And "intent"

> "is a question of fact which must be submitted to the jury."

The effect of this instruction was to render the defendant criminally liable for his negligence, ignorance or recklessness, and that of his accountants. **It makes the failure of the defendant to exercise due diligence and reasonable care the test of criminal liability.** "Knowledge" and "intent" are dispensed with.

In **Hargrove v. United States, 67 F. 2d 820** (5th Cir.), a tax evasion case, the Court discussed at length the effect of **"ignorance of the law"** on criminal liability. The trial court instructed:

> " 'Ignorance of the law, of course, gentlemen, is not excused. . . .
>
> . . . . .
>
> A man may have no intention to violate the law and yet if he willfully and knowingly does a thing which constitutes a violation of the law he has violated the law.' "

The Court held:

> "The **court here fell into the error** of not distinguishing between the elements of an offense, where the statute simply denounces the doing of an act as criminal, and where it denounces as criminal only its willful doing. In the first class of cases, especially in those offenses mala prohibita, the law imputes the intent. Landen v. U. S. (C. C. A.), 299 F. 75; U. S. v. Balint, 258 U.S. 250, 42 S. Ct. 301, 66 L. Ed. 604. Had the prosecution here been under such a statute, the charge of the court would have been unexceptionable. **In the second class of**

> **cases, a specific wrongful intent, that is, actual knowledge of the existence of obligation** and a wrongful intent to evade it, is of the essence." (Citing many cases (Emphasis supplied).

This case is squarely in point. Under it, the instruction given by the Court in the case at bar was clearly erroneous and highly prejudicial.

In the case at bar, as in the case cited, the prosecution is under a statute in which specific intent is an essential element and **knowledge that defendant's conduct violates the law cannot be imputed.** This is not a prosecution for a statutory offense in which intent and willfulness are not essential elements.

There can be no intent to violate the law without knowledge of what the law is or without knowledge that what one does or fails to do constitute a violation of law.

C

The Court instructed:

> "On the other hand, **one who signs a tax return** or assists in preparing a return or in providing information to be used therein **cannot escape the responsibility** of good faith as to the correctness of the return which he made, signed, filed or caused to be filed. **A man may not close his eyes to obvious facts** and say he is not aware of them. **He must exercise such intelligence as he has,** and if the evidence establishes beyond a reasonable doubt that the defendant intended to conceal tax liability from the Government, then, of course, he was not acting in good faith." (Tr. of Test. 863).

Exception was taken as follows:

> "We except to the portion of the instructions in which your Honor instructed the jury that when the defendant signed the tax return he could not avoid responsibilty therefore except by the exercise of good faith, on the ground that it was too limited in its scope and tended to render him criminally responsible for negligence or mistakes or recklessness of his accountants.
>
> We except to the portion of the charge in which your Honor instructed the jury in what we deemed to be an argumentative way that the defendant may not close his eyes to conditions and the inferences to be drawn therefrom.
>
> And in that same connection a portion of the instruction in which your Honor stated that the taxpayer must exercise his intelligence and indicated the consequences of failure to do so." (Tr. of Test. 875).

This portion of the instructions also dispenses with the necessity of "knowledge" of the falsity of the return and the principle that without "knowledge", there can be no "intent". **(Direct Sales Co. case, supra).** It conveys the idea that "intent" can be inferred from the mere fact that defendant signed a return. It translates carelessness into criminal intent. It ignores and, indeed, rejects the principle that carelessness or negligence can not be translated into criminal intent.

The giving of similar instructions under comparable circumstances have been held to be prejudicial error.

In **Bloch v. U. S., 221 F. 2d 786** (9th Cir.), a **tax evasion case,** the trial Court instructed:

> "The presumption is that a person intends the natural consequences of his acts, and the natural inference would be if a person consciously, knowingly and intentionally did not set up his income, and thereby the government was cheated or defrauded of taxes, that he intended to defeat the tax."

This Court held:

> "This is not a correct statement of law with regard to a criminal offense wherein specific intent is an essential element. Morissette v. U. S., 342 U.S. 246, 273, 72 S.Ct. 240, 96 L. Ed. 288; Wardlaw v. U. S., supra. As the Supreme Court said in the Morissette sase, supra, 342 U.S. at page 275, 72 S. Ct. at page 256:
>
> 'We think presumptive intent has no place in this case.' "

The trial Court in that case also instructed as follows:

> " 'Wilfully in the statute, which makes a willful attempt to evade taxes a crime, refers to the state of mind in which the act of evasion was done **It includes several states of mind, any one of which may be willfulness to make up the crime.**
>
> **'Willfulness includes doing an act with a bad purpose. It includes doing an act without a justifiable excuse. It includes doing an act without ground for believing that the act is lawful. It also includes doing an act with a careless disregard for whether or not one has the right so to act.' "** (Emphasis by the Court).

This Court held:

"We think that the italicized (boldface) portion of the above **instruction is erroneous** in this case."

In **Wardlaw v. U. S., 203 Fed. 2d 884** (5th Cir.), **tax evasion case,** the trial Court instructed as follows:

"The presumption is that a person intends the natural consequences of his acts, and the natural presumption would be if a person consciously, knowingly, or intentionally did not set up his income and thereby the government was cheated or defrauded of taxes, that he intended to defeat the tax."

The Court held:

"The appellant duly excepted to this charge. we think the exception was good and the giving of **this charge was prejudicial error. The intent** involved in this offense is **not inherent** in **the act itself,** but is a specific intent involving bad purpose and evil motive and that specific intent must be proved by or clearly inferred from the evidence. See authorities Footnote 2, supra.[5] "

In **Hartman v. United States, 215 F. 2d 386-394** (8th Cir.), the Court below instructed the jury as follows:

" 'The duty to file the return is personal and **cannot be delegated.** Bona fide mistakes should not be treated as false and fraudulent, but **no man** who is **able to read and write and who signs a tax return is able to escape the responsibility** of at least good faith and ordinary diligence as to the correctness of the statement which he signs, whether prepared by him or somebody else.' "

The Court of Appeals held:

"The instruction was given in a criminal case on the trial of the charge that defendant violated Section 145(b) in that he did wilfully attempt to defeat and evade a tax due and owing by him to the United States by filing a false income tax return which he knew was false.

Therefore the statement that a man could not escape the responsibility of ordinary diligence as to the correctness of the statement which he signs meant in the connection in which it was used that the jury ought to convict defendant if they found he did not use ordinary diligence as to the correctness of his income tax return.

Such declaration of the law is directly contrary to that of the Supreme Court in Spies v. U. S., 317 U.S. 492, 63 S. Ct. 364, 87 L. Ed. 418. In that case the court said, . . . 'The charge of the indictment here that defendant attempted to defeat and evade his tax by filing a false return could not be made out by merely showing that he **failed to use 'ordinary diligence** as to the correctness of his return. **The erroneous instruction was prejudicial.'** " (Emphasis supplied).

In **Berkovitz v. United States, 213 F. 2d 468,** (5th Cir.), the trial Court gave the following instruction:

"You are instructed that **you may find from the facts that the defendant signed his individual income tax returns that he had knowledge of the contents of the return.**

The owner of a business need not be the actual bookkeeper to be familiar with the affairs and finances of that business, but he

must be held to know that which it is his duty to know. It is for you to determine from all of the evidence whether the defendant has knowledge of the falsity of this return, provided you also find that the return was false." (Emphasis by the Court).

The Court of Appeals held it was prejudicial error to give this instruction.

In **Bentall v. United States, 262 Fed., 744** (8th Cir.), the trial Judge instructed as follows:

> " 'A man's intention in doing or saying a thing must be ascertained from what he does or says. A man cannot say he did not intend to do a certain thing, when the natural consequence of his act is bound to be so and so. He cannot then come in and say that he never intended to do that. A man ought to be and must be judged by the natural consequences of his acts. If this use of the words naturally and necessarily produces that effect, then you must judge of the intention of the man by the words themselves.' "

The Court of Appeals holding that giving that instruction was reversible error said:

> "It is true that, when one knowingly does an act (including the utterance of words), the presumption arises that he intended the results which would naturally follow. Reynolds v. United States, 98 U.S. 145, 167, 25 L. Ed. 244. But where the act must, as here, be 'knowingly and willfully' done to be criminal, not only a knowledge of the act is implied, 'but a determination with a bad intent to do it.' Felton v. United States, 96 U.S. 699, 702, 24 L. Ed. 875; Hicks v. United States, 150 U.S. 442, 449, 14 Sup. Ct. 144, 37 L. Ed. 1137. And the presump-

tion of wrongful intent, based upon the natural result of the words or acts, while constituting strong evidence of the presence of such intent, is not conclusive, but rebuttable."

In **Lurding v. United States, 179 F. 2d 419** (6th Cir.), the Court held:

"The court further advised the jury that 'It is immaterial that the return may have been made out by another person or that some other person may have assisted in the making of the return. When a return is signed and filed by a taxpayer it becomes his return and he, in law, is responsible for that return.' The doctrine of **respondeat superior** is not to be drawn from the law of negligence and applied to criminal liability. It is true that the signing of the return by a taxpayer makes it his return, and that if it is false **and the taxpayer knows it to be false,** he violates the law if he files it with the Collector wilfully with an intent to evade the payment of his tax, but where the crux of the offense is the wilfulness of the understatement it is not an immaterial circumstance that the taxpayer did not make out the return, and it becomes immaterial only when the government has established, by direct proof or by cirstances, that the taxpayer knew or perhaps should have known that the return was false.

We think that these errors were prejudicial, that prejudice was not cured by the remainder of the instructions, and that they call for reversal."

The portions of the instructions, referred to above, fall within the criticism and vice pointed out in the foregoing cases.

The giving of these portions of the instructions was particularly damaging to the defendant be-

cause the case made by the Government was particularly weak on the question of **knowledge** and **intent.** There was strong affirmative evidence **in the Government's case** that negatived intent. This evidence demonstrated that during the times in question, the defendant was involved in very serious difficulties. The Government's witnesses testified that all of the acts (which appear to be inconsistent with ordinary business practices, standing alone, create suspicion), **were directly caused by these difficulties.**

In view of the weakness of the Government's case on the question of intent, the giving of these instructions was tantamount to a direction that intent could be inferred from the fact that he signed the returns and in the case of the year 1949, the failure to file a return. It was an invitation to reject the exculpatory testimony which was **part and parcel of the Government's case.** It, in effect, said that neglect or the failure to "exercise such intelligence as he had", was sufficient evidence to warrant a finding of the requisite intent to evade tax.

SPECIFICATION OF ERROR NO. IV

The Court below erred in the refusal to give instruction number 1, 7, 10, 15, 18, 19, 20, 22, 23, 24, and 26, requested by defendant.

ARGUMENT

During the trial defendant submitted to the Court written requests for instructions to be given to the Jury (Tr. of Rec. 18).

A

In defendant's requested Instruction **No. 1,** the Court was asked to instruct as to the **elements of the offenses** charged in Counts I and II of the indictment. Among the elements was the following:

> "That at the time he filed the said returns and paid the said taxes, the defendant **had the specific intent to evade** the payment of a substantial part of the income taxes which he was legally bound to pay to The United States; that is to say, with the intent to cheat and defraud the Government of taxes legally due and owing to the Government." (Tr. of Rec. 19).

The Court failed to include this element or the substance thereof in stating the elements of the offenses under Counts I and II of the indictment. (Tr. of Test. 854).

The prejudicial effect of the failure to give this instruction, was increased by the fact that the Court, in stating the essential elements **under Count III,** did specifically instruct that specific intent to

evade was an essential element. As to the third Count, the Court instructed:

> "Fifth, that the failure to file such income tax return and to pay said tax was with the specific intent to evade the payment of said tax; that is to say, that he intentionally and deliberately refrained from filing the return and paying the tax for the purpose of cheating and defrauding the Government of revenue legally due to the Government." (Tr. of Test 856).

The inclusion of this element in defining the offense under the third Count, was bound to leave the Jury under the impression that the element of specific intent was not essential to conviction under Counts I and II.

In **Lott v. United States, 218 F. 2d 675** (5th Cir.), the Court held:

> "The court should define the various crimes charged, and **the elements** of each, to the extent necessary to enable the jury to apply the law to the facts. Kenton v. Gill, 81 U.S. App. D.C. 96, 155 F. 2d 176, 179; **Morris v. United States,** 9 Cir., 156 F. 2d 525, 169 A.L.R. 305, and cases therein cited."

In **Morris v. United States, 156 F. 2d 525** (9th Cir.), the Court considered the instructions (even though no assignment of error was made) and reversed a conviction because the Court insufficiently defined the offense. The Court held:

> "The charge to the jury should not leave the jurors in ignorance of or leave them to their conjecture as to what constitutes the offense charged.
>
> . . . . .

In the course of our research we have read decisions upon the point as to whether mere reference by the judge in his instructions to the information or indictment, which is handed the jury to take to the jury room, is sufficient information as to the offense charged. And the great weight of authority is that such practice is not sufficient. **The Court must directly and not by reference to a document in the jury's possession define the offense charged in clear and precise language."** (citing many cases).

In **23 Corpus Juris Secundum, page 741, Section 1194,** the text says:

"The instructions must contain a definition or explanation of the crime charged, in precise and accurate language, **setting forth the essential elements thereof.** In defining an offense the court may fit the definition to the facts in the case as the evidence tends to show such facts to be. **An instruction is erroneous which asumes to state all the elements of the crime, but omits one or more of them,** or which refers the jury to the indictment or information to ascertain any of the essential elements."

In **Samuel v. United States, 169 F. 2d 787,** (9th Cir.), the Court held:

"In a criminal case the court must instruct on all essential questions of law involved, whether or not it is requested to do so." (citing many cases).

B

Requested Instruction **No. 7** was as follows:

"The indictment does not charge that there was any falsity or fraud in the filing of the

partnership information returns for the years 1947 and 1948. It only charges that defendant's individual tax returns for those years were filed to evade the payment of a part of his income tax liability." (Tr. of Rec. 7).

The Court did not give this requested instruction or the substance thereof.

The refusal to give this instruction was prejudicial to the defendant. **The indictment did not charge any falsity in the partnership returns** for the years 1947 and 1948. **It did not charge that defendant's individual tax return for those years was false insofar as it reported his distributive share of the partnership income.** Nevertheless, the Court permitted the introduction of a great deal of evidence designed to show that some **sales made by the partnership were not reflected in the partnership returns.** Under these circumstances, it was essential that the jury should be made aware that the defendant was not on trial for falsity of the partnership returns, but only for falsity of his own individual return.

The error was particularlly prejudicial with respect to the tax year **1947** because the **partnership return** for **that year was not signed by defendant** and there was not a scintilla of evidence that he was aware of its contents.

The refusal was also prejudicial because all of the evidence of alleged additional income (admitted over defendant's objection) consisted of "partner-

ship" **"receipts", not** partnership "gross income" or "net income" without any evidence to show what part of the "receipts" constituted "taxable net income" (profits). It was important that the Jury should know what part of the partnership "receipts" resulted in "taxable net income" **to defendant individually** to be reflected in his individual return.

C

Requested Instruction **No. 10** was as follows:

> "You are instructed that if you find from the evidence that there was an under-statement of net income and the tax due thereon in the returns for the years 1947 and 1948, and you further find that the under-statement and under-payment were due to carelessness or negligence, or mistake, or in errors of his accountants, or persons who prepared his returns, and he was unaware of the inaccuracy, you must render a verdict of not guilty as to these counts." (Tr. of Rec. 21).

The Court did not give this instruction or the substance of this instruction. The refusal to give this instruction was highly prejudicial, especially when considered in the light of the instruction given by the Court discussed above under Specification of Error No. III A and B.

There is a great abundance of evidence in the record of carelessness and negligence on the part of the defendant and his accountants in recording both items of income as well as the **failure to record a great many deductible expenses.** The evidence is

part of the Government's case. The record fully warranted the giving of the requested instruction. **It presents the defendant's theory of the based upon substantial, if not, conclusive evidence of the facts included in the hypothesis** of the instruction and defendant was clearly entitled to an instruction upon this theory of the case.

In **Calderon v. United States, 279 Fed. 556** (5th Cir.), the Court held:

> "Where the evidence presents a theory of defense, and the court's attention is particularly directed to it, it is reversible error for the court to refuse to make any charge on such theory. Bird v. United States, 180 U.S. 356, 361, 21 Sup. Ct. 403, 45 L. Ed. 570; Hendrey v. United States, 233 Fed. 5, 18, 147 C. C. A. 75; Liner v. State, 124 Ala. 1, 7, 27 South. 438; Banks v. State, 89 Ga. 75, 14 S.E. 927. We think the court erred in refusing to charge the jury as to the defendant's theory of the case, and that such error requires a reversal of the judgment of conviction of the plaintiff in error."

D

Requested Instruction **No. 15** is as follows:

> "You are instructed that the burden of proving the defendant guilty of the offenses charged in the indictment **never shifts** from the Government. The burden is not upon the defendant to prove his innocence. That burden rests upon the plaintiff." (Tr. of Rec. 22).

The request clearly embodied a correct and fundamental rule of law and defendant was entitled to the benefit of such an instruction. The failure

to give this instruction was prejudicial to the defendant.

E

Requested Instruction **No. 18** is as follows:

> "You are instruced that if the defendant had no net income in the tax year of 1949, there would be no tax liability for that year and the failure to file a return for that year would not constitute an offense under Section 145 (b) of the Internal Revenue Code, and your verdict must be for the defendant on Count III of the indictment." (Tr. of Rec. 22).

The Court did not give this instruction or the substance thereof.

There is a great deal of substantial, if not conclusive, evidence **in the Government's case** that defendant had no taxable income in the tax year 1949. Defendant was entitled to an instruction based upon his theory of the case and the hypothesis included in the request.

There can be no attempt to evade the tax without tax liability.

> United States v. Schenck, 126 F. 2d 702 (Second Cir.).
> Gleckman v. United States, 80 F. 2d 394 Eighth Cir.).

It is settled beyond question that a defendant is entitled to an instruction submitting the case to the jury on his theory of the case as to which there is evidence in the record.

In **Marson v. United States, 203 F. 2d 904-912** (6th Cir.), the Court held:

"With respect to a charge on the theory relied upon, it is the law that where a defendant in a criminal case presents a theory supported by the evidence, and the court's attention is particularly directed to it, it is reversible error to refuse to give a charge on such theory."

In **Tatum v. United States, 190 F. 2d 612** (Ct. App. Dist. Col.), the Court held:

" 'in criminal cases the defendant is entitled to have presented instructions relating to a theory of defense for which there is any foundation in the evidence, even though the evidence may be weak, insufficient, inconsistent, or of doubtful credibility. He is entitled to have such instructions even though the sole testimony in support of the defense is his own.' "

F

Requested Instruction **No. 19** is as follows:

"You are instructed that even if the defendant had net income subject to income tax in the tax year 1949, but failed to file an income tax return and pay the tax therein through inadvertence, mistake, or over-sight, your verdict must be for the defendant on Count III of the indictment." (Tr. of Rec. 22).

The Court did not give this instruction or the substance thereof.

There is very substantial if not conclusive evidence in the record to the effect that the failure to file a return for the tax year 1949 was due to mistake or inadvertence. The record establishes that the accountant prepared a partnership return and individual returns for that year. He testified that

he brought the returns to the home of Mary Elwert; that Leo and Mary Elwert were both present; that he handed them the returns, told them to sign them and file them (Tr. of Test. 227). The returns showed no tax liability (Exhs. 44 and 45). The returns were not signed. There is no evidence as to why they were not signed and filed. **But there is very strong evidence in the Government's case that the returns were not, in fact, delivered by the Accountant Hammond to the Elwerts. The testimony in the Government's case establishes that the original returns, which Hammond, the accountant, prepared, were found by the Internal Revenue Agents Menlow and Kuhn among the records which they obtained from the Accountant, Hammond** (Tr. of Test. 577). **They had photostatic copies of those returns made. They later returned the records, including the returns, to Hammond and Hammond delivered them with the returns to defendant's accountant, Eiseman.** (Tr. of Test. 569-570).

This testimony establishes very definitely that the returns were not delivered by Hammond to the Elwerts; that they remained in his possession at all times and that the failure to file the returns were due to some over-sight, negligence or inadvertence of the accountant.

Defendant was entitled to have the case submitted to the Jury on the hypothesis included in the requested instruction because there was substantial, if not conclusive, evidence to establish that

hypothesis. The failure to give the instruction was prejudicial error.

Morris v. United States, supra.
Tatum v. United States, supra.

G

Requested Instruction **No. 20** is as follows:

> "Evidence has been introduced tending to show that through mistake, inadvertence, ignorance and other causes the accountants, who prepared the returns for the defendant, failed to take deductions from gross income which would have reduced his tax liability if the deductions had been taken.
>
> If you find from the evidence that there was failure to take deductions to which the defendant would have been entitled, you are instructed that you should take that fact into account in determining whether an under-statement in net income, if any there be, was made with the specific intent to defeat and evade income tax, or was due to negligence, carelessness, or ignorance." (Tr. of Rec. 22-3).

The Court did not give this instruction or the substance thereof.

There is a great deal of conclusive evidence that the accountants who prepared defendant's returns, those that were filed and the one that was unfiled, failed to take many allowable deductions of very substantial amounts which would reduce or wipe out tax liability in those years. Some of the failures to take deductions were due to the carelessness of the defendant in failing to keep adequate

records of such expenditures and to inform the accountant thereof. But the evidence establishes very definitely that such expenditures were made in very large amounts as already demonstrated.

Defendant was entitled to have the case submitted to the jury upon the hypothesis included in the requested instruction.

Morris v. United States, supra.
Tatum v. United States, supra.

The failure to take allowable deductions is very strong evidence of lack of intent to evade tax liability. A taxpayer bent on cheating the Government would avail himself of every dollar of allowable expense as a deduction and would be disposed, if anything, to over-state such deductions. The failure to **take the allowable deductions is inconsistent with intent to evade.** The requested instruction was very important on the question of intent and the failure to give the instruction was prejudicial error.

H

Requested Instruction **No. 22** is as follows:

"Evidence has been introduced that the defendant cashed remittances representing income to the partnership and expended the cash in payment of labor and materials and other business purposes; that the cash received from said remittances was not reflected in the books of the partnership and that the expenditure of said funds for business purposes was not reflected in the books of the partnership.

You are instructed that if you find that defendant did cash remittances constituting reve-

nue of the partnership and expended the cash in payment of labor, materials and other business expenditures on behalf of the partnership, the cashing of said remittances does not constitute concealment of net income or evasion of tax liability." (Tr. of Rec. 23).

This requested instruction was not given, nor did the Court give the substance thereof. There is an abundance of substantial evidence in the record to sustain, the hypothesis upon which the requested instruction was predicated. Defendant was entitled to have the case submitted to the jury upon that theory of the case.

Morris v. United States, supra.
Tatum v. United States, supra.

I

Requested Instruction **No. 23** is as follows:

"You are instructed that the charges in Counts I and II of the indictment that defendant attempted to evade his tax by filing a false return, cannot be made out by **merely showing that he failed to use diligence** as to the correctness of his return for the years involved in those two counts." (Tr. of Rec. 24).

The Court did not give this instruction, nor the substance thereof. It stated a correct principle of law and was particularly applicable to the evidence as it was developed in the Government's case. The giving of such an instruction was especially necessary because of the instruction which the Court gave relative to the exercise of reasonable diligence by the defendant in the preparation of returns and

the consequences of the lack of reasonable diligence. This instruction, if given, would have made clear to the jury the lack of diligence alone was not sufficient to establish intent.

J

Requested Instruction **No. 24** is as follows:

"In determining whether or not the defendant had such specific intent, you may take into consideration the defendant's business or occupation, the extent of his education, his knowledge, or lack of knowledge, of bookkeeping or accounting; the extent of his familiarity with the keeping of ordinary business records; the employment by the partnership of accountants who were former employees of the Internal Revenue Bureau; that defendant believed them to be fully qualified to supervise and keep the records of the partnership, and to make proper income tax returns. You may also take into account for that purpose, the business and other difficulties in which the defendant was involved in the tax years in question and the extent to which they caused him to engage in practices which may be deemed to be out of the ordinary business practices. You may also take into account the fact, if you find it to be a fact, that in the operation of the business of the partnership, it was necessary for the defendant to have in his possession daily, large sums of cash with which to pay for purchases of supplies and other expenditures on behalf of the partnership. You may also take into consideration the fact, if you find it to be a fact, that the defendant failed to take deductions in the tax years in question which would have resulted in reducing his tax liability.

These are all factors that can be properly considered by you, along with all other evidence in the case, in determining whether or not the defendant filed the said returns with the specific intent to defeat the payment of a part of his income tax for those years." (Tr. of Rec. 24-5).

The Court did not give this instruction or the substance thereof.

Since the crucial element in the case was the specific intent to evade defendant's tax liability, the defendant was entitled to have the Court instruct the jury as to the elements that the jury could properly consider in determining the existence or non-existence of the specific intent to evade.

There was substantial evidence in the record to establish the existence of all of the circumstances or elements involved in the hypothesis incorporated in the instruction.

K

Requested Instruction **No. 26** is as follows:

"Evidence has been introduced to the effect that the books and records maintained by the Tualatin Valley Nursery partnership, were incomplete, inadequate, and defective.

You are instructed that the defendant cannot be convicted of the offenses charged in the indictment merely because the books and records were kept in that manner.

If you find that the books and records were incomplete and inaccurate and the records were

so maintained through carelessness, mistake, or ignorance, and that the defendant was unaware of the fact that they were so kept, an under-statement of the net income in the income tax returns, if any there be, would not constitute a wilfull attempt to evade the payment of tax, and your verdict must be for the defendant." (Tr. of Rec. 26).

The Court did not give this requested instruction or the substance thereof.

The failure to give this instruction was especially prejudicial to the defendant because of the instructions that the Court gave with respect to the necessity of keeping books of account and records (Spec. of Error III A).

The instruction as given, imposed the duty of keeping records and it left the implication that the failure to keep the records or keeping the records inaccurately, would make defendant criminally liable. It was, therefore, essential that the jury should be instructed that if the inaccuracy or inadequacy of the records resulted from carelessness of the defendant or his accountant, no criminal responsibility could be predicated thereon. The failure to give that instruction or the substance thereof was prejudicial error. There was an abundance of evidence, if not conclusive evidence, in the record to support the hypothesis included in the requested instruction and defendant was entitled to have the case submitted to the jury on his theory of the case.

We submit that each of these requested instructions embodied correct principles of law; they were predicated upon substantial, if not conclusive, evidence; they were essential for the protection of the defendant's rights and for a proper consideration of the case by the jury. Many of these instructions were especially important in view of the instructions that were given by the Court to overcome erroneous conclusions when left unexplained by the requested instructions.

Whatever may be said as to the error in refusing to give any one or more of the instructions, the cumulative effect of the failure to give all of the said instructions was highly detrimental to a proper consideration of the case upon the hypothesis involved in the instructions.

CONCLUSION

The error of the Court below in failing to grant defendant's motions for judgment of acquittal as to each of the counts of the indictment, stems from the failure to give due consideration and effect to the exculpatory evidence which is an integral part of the Government's case.

In the case at bar, the exculpatory evidence did not come from the defendant or from witnesses produced by the defendant in the defendant's case (except insofar as it confirmed and was consistent with the Government's testimony). It came from the Government's witnesses as part and parcel of its case. The acceptance of and giving effect to that exculpatory evidence did not depend on the credibility of the witnesses. Since the exculpatory evidence was an integral part of the Government's case, the Court below was bound to accept it and give effect thereto on the motions for judgment of acquittal. It was bound to accept the explanations and reasons for the acts that might otherwise give rise to suspicion or even adverse inference. The Court below is also bound to give effect to the evidence of defendant's failure to take the many allowable deductions which not only wipe out any tax liability in excess of the amount reported in the returns, but established losses in the years in question and large overpayment of taxes.

It has been held that even in cases where the exculpatory evidence comes from the defendant and

his witnesses, that judgment of acquittal must be granted if that evidence is credible and explains the discrepancies. **(Wesson v. U. S., 172 F. 2d 931).**

Upon the record in this case, the judgment of conviction should be reversed with directions to enter a judgment of acquittal as to each of the counts of the indictment.

Respectfully submitted,

S. J. BISCHOFF,
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Attorneys for Appellant.

APPENDIX

The following tabulations and computations are not exhibits. They are computations made by Appellant based on the computations of Government's expert Mytinger and defendant's computations based upon the evidence.

I

Computation of Partnership income for 1947.

	Amount	Per Return	Per Plaintiff's Expert (Mytinger)	Per Defendant's Contentions
nary Income				
rtnership income		$58,587.88	$58,587.88	$58,587.88
leged additional partnership receipts per Mytinger's computations			23,196.74	23,196.74
Total		$58,587.88	$81,784.62	$81,784.62
tional Deductions				
sh paid to Progressive Printing Co. test. of Walsleben, Tr. of Test. 761				3,429.25
sh paid to itinerant workers (minimum amounts)				
Cherry harvest, 20 days x 20 men @ $5.00 (Tr. of Test. 749 and 798)	$ 2,000.00			
Nursery work, 65 days x 25 men @ $5.00 (Tr. of Test. 771, 799, 800)	8,125.00			
Nut harvest, 30 days x 50 men @ $5.00 (Tr. of Test. 797, 798)	7,500.00			
Prune harvest, 30 days x 25 men @ $5.00 (Tr. of Test. 795, 796)	3,750.00			21,375.00
sses on sales of depreciable business property (Sec. 117J assets):				
Loss on sale of Motel 99 W	$ 540.00			
Loss on sale of army truck	550.00	see below	1,090.00	1,090.00
Partnership's ordinary net income —½ carried over to defendant's individual computation		$58,587.88	$80,694.62	$55,890.37
t-Term Capital Loss				
n-business bad debt — Lester McConkey note—½ carried over to defendant's individual computation		see below	see below	$ 3,000.00
g-Term Capital Loss				
ss on sale of Motel 99 W		$ 270.00	see above	see above
ss on sale of army truck		275.00	see above	see above
d debt—Lester McConkey note		$ 1,500.00	$ 1,500.00	see above
Total capital losses — ½ carried over to defendant's individual computation		$ 2,045.00	$ 1,500.00	$ 3,000.00

II

Computation of Appellant's individual net income and tax liability for **1947**.

	Per Return	Per Plaintiff's Expert (Mytinger)	Per Defendant's Contentions	
			Before Net Operating Loss Carry-Back	After Net Operating Loss Carry-Back
½ of partnership income	$29,293.94	$40,347.31	$27,945.18	$27,945.
Less: ½ of capital loss, but not more than $1,000.00	1,000.00	750.00	1,000.00	1,000
½ of net operating loss carry-back from 1949				15,494
Adjusted gross income	$28,293.94	$39,597.31	$26,945.18	$11,450.
Less: Standard deduction	500.00			
Oregon income taxes paid (Tr. of Test. 45, 604, 612 to 614 and 703)		3,093.75	3,093.75	3,093
Net income	$27,793.94	$36,503.56	$23,851.43	$ 8,356.
Less: exemptions	1,000.00	1,000.00	1,000.00	1,000
Taxable net income	$26,793.94	$35,503.56	$22,851.43	$ 7,356.
Tenative tax	$11,232.24	$16,737.31	$ 8,882.34	$ 1,767.
Less: 5% reduction	561.61	836.87	444.11	88.
Total tax liability	$10,670.63	$15,900.44	$ 8,438.23	$ 1,678.
Capital loss carry-over to 1948				$ 1,000

	Before Net Operating Loss Carry-Back	After Net Operating Loss Carry-Back
Summary		
Federal income taxes paid	$10,670.63	$10,670.63
Total tax liability per defendant's computation	8,438.23	1,678.68
Overpayment	$ 2,232.40	$ 8,991.95

III

Computation of Partnership Income for 1948.

	Per Return	Per Plaintiff's Expert (Mytinger)	Per Defendant's Contentions
inary income			
artnership income	$27,015.34	$27,015.34	$27,015.34
lleged additional partnership receipts per Mytinger's computations		3,532.42	3,532.42
voice copies identified by Mrs. Lillian Helvie			75.40
Total	$27,015.34	$30,547.76	$30,623.16
itional Deductions			
ash paid to Progressive Printing Co.—testimony of Walsleben			779.05
ash paid to intinerant workers, as per 1947 computations			21,375.00
terest paid on 99 W Motel contract (Tr. of Test. 704)		100.99	100.99
ollection charges (Tr. of Test. 704)		9.10	9.10
Partnership ordinary net income—carried over to defendant's individual computation	$27,015.34	$30,437.67	$ 8,359.02
ital gain and losses			
le of timber to Dant & Russel—long-term, only ½ reportable		$18,930.00	$18,930.00
ad debt—Denton note, (Tr. of Test. 707, 495 to 498)		18,930.00	22,200.00
00 shares of Producers Gas and Oil Co. common stock, worthless at 12-31-1948, cost $8,500.00, only ½ reportable (Tr. of Test. 305 to 308, 311 to 313)			4,250.00
apital loss carry-over from 1947—Lester McConkey note		none	1,000.00
Excess of capital losses—carried over to defendant's individual computation		none	$ 8,520.00

IV

Computation of Appellant's individual net income and tax liability for 1948.

	Per Return	Per Plaintiff's Expert (Mytinger)	Per Defendant Contenti
Ordinary partnership income	$27,015.34	$30,437.67	$ 8,359
Less: capital loss of $8,520.00, but not to exceed $1,000.00			1,000
Adjusted gross income	$27,015.34	$30,437.67	$ 7,359
Less: deductions	1,692.60	1,692.60	1,000
Net income	$25,322.74	$28,745.07	$ 6,359
Less: exemptions	2,400.00	2,400.00	2,400
Taxable income	$22,922.74	$26,345.07	$ 3,959
One-half of taxable income	$11,461.37	$13,172.53	$ 1,979
Tax on one-half	$ 3,195.32	$ 3,904.19	$ 395
Less: reduction	403.44	488.50	67
Tax liability on one-half	$ 2,791.88	$ 3,415.69	$ 328
Tax on total income	$ 5,583.76	$ 6,831.38	$ 657
Capital loss carry-over to 1949 and later years from above			$ 7,520

Summary

Federal income tax paid	$ 5,583.76
Total tax liability per defendant's computation	657.20
Overpayment	$ 4,926.45

V

Computation of Partnership Income for 1949.

	Per Unfiled Return	Per Plaintiff's Expert (Mytinger)	Per Defendant's Contentions
nary income			
rtnership income	$ 1,833.32	$ 1,833.32	$ 1,833.32
leged additional partnership receipts per Mytinger's computations		7,355.72	7,355.72
dditional cash sales claimed, invoice copies identified by Lillian Helvie			209.65
Total	$ 1,833.32	$ 9,189.04	$ 9,398.69
itional deductions			
verstatement of receipts (Tr. of Test. 302, 326, 327, 378) at least			19,000.00
sh paid to itinerant workers per 1947 computations			21,375.00
llection charge		13.00	13.00
Partnership ordinary net income/loss—½ carried over to defendant's individual computation	$ 1,833.32	$ 9,176.04	$30,989.31
tal gains and loss			
mber sale to Longview Fibre Co.—long-term—½ only		$ 1,666.44	$ 1,666.44
Gain—½ carried over to defendant's individual computation	none	$ 1,666.44	$ 1,666.44

VI

Computation of Appellant's individual net income and tax liability for **1949.**

	½ of Amount in Unfiled Joint Returns	Per Plaintiff's Expert (Mytinger)	Per Defenda Contenti
½ of partnership income	$ 916.66	$ 4,588.02	$15,494
Capital gain—Longview Fibre Co.—Long-term—½ only	833.22	833.22	833
Less: Capital loss carry over from 1948—allowable this year $7,520.00			1,833
Oregon income tax—standard deduction	666.44	542.12	
Exemptions	1,200.00	1,200.00	1,200
Taxable income	none $ 1,083.44	$ 3,679.12	n
Tax liability	none	$ 657.08	n

Summary

Federal income tax paid	none
Total tax liability per defendant's computation	none
Underpayment	**none**